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WILHELMINA BOWLES, Administratrix
of the Estate of Edmund J. Bowles,
Deceased,

Appellee,

vs.

FIDELITY HEALTH AND ACCIDENT
COMPANY OF BENTON HARBOR, MICHIGAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 597¹

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$737.50 entered upon trial by the court of a suit on an insurance policy covering sickness of Edmund J. Bowles. It was alleged that on March 25, 1932, Bowles was disabled by illness and that under the terms of the policy he was entitled to an indemnity of \$25 a week during the period of this illness.

Pending this appeal Edmund J. Bowles died and the administratrix has been substituted.

The principal defense was misrepresentation of the age of the insured at the time he applied for the insurance. The policy contained a provision that it was issued in consideration of the statements made in the application, which was dated February 26, 1931. There was also a provision that the falsity of any statement in the application "shall bar the right to recover if such false statement is made with intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the company." In the application the insured gave his age as fifty-two, date of birth April 10, 1879. Much of the trial was taken up with colloquies between respective counsel and the court over the admissibility of evidence offered by defendant. On cross-examination the insured testified that his parents had been slaves and that he did not know when he was born. It might be noted that

slavery had been abolished approximately sixteen years before 1879.

Defendant sought to introduce an application of Bowles for employment with the Pullman company on June 23, 1899, in which he gave his age as thirty-four. If this stated the fact as to his age, then he was sixty-six years of age in February, 1931, the date of his application for insurance, instead of fifty-two years as stated in the application. The court excluded this evidence and also all evidence tending to show that the person who signed the application to the Pullman company was the Edmund J. Bowles who had signed the application for insurance.

Defendant's counsel attempted to develop from Bowles that he had applied for and obtained a policy from another insurance company in August, 1907, in which he gave May 15, 1872, as the date of his birth. If this is the correct date, then the insured was fifty-nine years of age when he made the application to the defendant company, and not fifty-two. The court, however, sustained objections to all attempts tending to show that the insured had at other times made different statements as to his age, which statements tended to prove that he was considerably older than his age given in the application to defendant. It must certainly be conceded that a false statement, knowingly made, as to the age of an applicant for insurance is a material misrepresentation which would void the policy in the instant case, especially as the age given is several years less than what defendant asserts it to be.

Central Accident Ins. Co. v. Spence, 126 Ill. App. 32; 37 Corpus Juris, page 451.

The application contained the provision that insurance was issued to men from "ages sixteen to fifty-five only." Defendant says that the Illinois statute forbids the issuing of such policies to anyone over sixty-five years of age. Para. 413, ch. 73, Ill. Stat. (Cahill) 1931. Even if the policy might be held valid, if

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States as a whole, and also of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States.

10C, 11C, 12C, 13C, 14C, 15C, 16C, 17C, 18C, 19C, 20C, 21C, 22C, 23C, 24C, 25C, 26C, 27C, 28C, 29C, 30C, 31C, 32C, 33C, 34C, 35C, 36C, 37C, 38C, 39C, 40C, 41C, 42C, 43C, 44C, 45C, 46C, 47C, 48C, 49C, 50C, 51C, 52C, 53C, 54C, 55C, 56C, 57C, 58C, 59C, 60C, 61C, 62C, 63C, 64C, 65C, 66C, 67C, 68C, 69C, 70C, 71C, 72C, 73C, 74C, 75C, 76C, 77C, 78C, 79C, 80C, 81C, 82C, 83C, 84C, 85C, 86C, 87C, 88C, 89C, 90C, 91C, 92C, 93C, 94C, 95C, 96C, 97C, 98C, 99C, 100C, 101C, 102C, 103C, 104C, 105C, 106C, 107C, 108C, 109C, 110C, 111C, 112C, 113C, 114C, 115C, 116C, 117C, 118C, 119C, 120C, 121C, 122C, 123C, 124C, 125C, 126C, 127C, 128C, 129C, 130C, 131C, 132C, 133C, 134C, 135C, 136C, 137C, 138C, 139C, 140C, 141C, 142C, 143C, 144C, 145C, 146C, 147C, 148C, 149C, 150C, 151C, 152C, 153C, 154C, 155C, 156C, 157C, 158C, 159C, 160C, 161C, 162C, 163C, 164C, 165C, 166C, 167C, 168C, 169C, 170C, 171C, 172C, 173C, 174C, 175C, 176C, 177C, 178C, 179C, 180C, 181C, 182C, 183C, 184C, 185C, 186C, 187C, 188C, 189C, 190C, 191C, 192C, 193C, 194C, 195C, 196C, 197C, 198C, 199C, 200C, 201C, 202C, 203C, 204C, 205C, 206C, 207C, 208C, 209C, 210C, 211C, 212C, 213C, 214C, 215C, 216C, 217C, 218C, 219C, 220C, 221C, 222C, 223C, 224C, 225C, 226C, 227C, 228C, 229C, 230C, 231C, 232C, 233C, 234C, 235C, 236C, 237C, 238C, 239C, 240C, 241C, 242C, 243C, 244C, 245C, 246C, 247C, 248C, 249C, 250C, 251C, 252C, 253C, 254C, 255C, 256C, 257C, 258C, 259C, 260C, 261C, 262C, 263C, 264C, 265C, 266C, 267C, 268C, 269C, 270C, 271C, 272C, 273C, 274C, 275C, 276C, 277C, 278C, 279C, 280C, 281C, 282C, 283C, 284C, 285C, 286C, 287C, 288C, 289C, 290C, 291C, 292C, 293C, 294C, 295C, 296C, 297C, 298C, 299C, 300C, 301C, 302C, 303C, 304C, 305C, 306C, 307C, 308C, 309C, 310C, 311C, 312C, 313C, 314C, 315C, 316C, 317C, 318C, 319C, 320C, 321C, 322C, 323C, 324C, 325C, 326C, 327C, 328C, 329C, 330C, 331C, 332C, 333C, 334C, 335C, 336C, 337C, 338C, 339C, 340C, 341C, 342C, 343C, 344C, 345C, 346C, 347C, 348C, 349C, 350C, 351C, 352C, 353C, 354C, 355C, 356C, 357C, 358C, 359C, 360C, 361C, 362C, 363C, 364C, 365C, 366C, 367C, 368C, 369C, 370C, 371C, 372C, 373C, 374C, 375C, 376C, 377C, 378C, 379C, 380C, 381C, 382C, 383C, 384C, 385C, 386C, 387C, 388C, 389C, 390C, 391C, 392C, 393C, 394C, 395C, 396C, 397C, 398C, 399C, 400C, 401C, 402C, 403C, 404C, 405C, 406C, 407C, 408C, 409C, 410C, 411C, 412C, 413C, 414C, 415C, 416C, 417C, 418C, 419C, 420C, 421C, 422C, 423C, 424C, 425C, 426C, 427C, 428C, 429C, 430C, 431C, 432C, 433C, 434C, 435C, 436C, 437C, 438C, 439C, 440C, 441C, 442C, 443C, 444C, 445C, 446C, 447C, 448C, 449C, 450C, 451C, 452C, 453C, 454C, 455C, 456C, 457C, 458C, 459C, 460C, 461C, 462C, 463C, 464C, 465C, 466C, 467C, 468C, 469C, 470C, 471C, 472C, 473C, 474C, 475C, 476C, 477C, 478C, 479C, 480C, 481C, 482C, 483C, 484C, 485C, 486C, 487C, 488C, 489C, 490C, 491C, 492C, 493C, 494C, 495C, 496C, 497C, 498C, 499C, 500C, 501C, 502C, 503C, 504C, 505C, 506C, 507C, 508C, 509C, 510C, 511C, 512C, 513C, 514C, 515C, 516C, 517C, 518C, 519C, 520C, 521C, 522C, 523C, 524C, 525C, 526C, 527C, 528C, 529C, 530C, 531C, 532C, 533C, 534C, 535C, 536C, 537C, 538C, 539C, 540C, 541C, 542C, 543C, 544C, 545C, 546C, 547C, 548C, 549C, 550C, 551C, 552C, 553C, 554C, 555C, 556C, 557C, 558C, 559C, 560C, 561C, 562C, 563C, 564C, 565C, 566C, 567C, 568C, 569C, 570C, 571C, 572C, 573C, 574C, 575C, 576C, 577C, 578C, 579C, 580C, 581C, 582C, 583C, 584C, 585C, 586C, 587C, 588C, 589C, 590C, 591C, 592C, 593C, 594C, 595C, 596C, 597C, 598C, 599C, 600C, 601C, 602C, 603C, 604C, 605C, 606C, 607C, 608C, 609C, 610C, 611C, 612C, 613C, 614C, 615C, 616C, 617C, 618C, 619C, 620C, 621C, 622C, 623C, 624C, 625C, 626C, 627C, 628C, 629C, 630C, 631C, 632C, 633C, 634C, 635C, 636C, 637C, 638C, 639C, 640C, 641C, 642C, 643C, 644C, 645C, 646C, 647C, 648C, 649C, 650C, 651C, 652C, 653C, 654C, 655C, 656C, 657C, 658C, 659C, 660C, 661C, 662C, 663C, 664C, 665C, 666C, 667C, 668C, 669C, 670C, 671C, 672C, 673C, 674C, 675C, 676C, 677C, 678C, 679C, 680C, 681C, 682C, 683C, 684C, 685C, 686C, 687C, 688C, 689C, 690C, 691C, 692C, 693C, 694C, 695C, 696C, 697C, 698C, 699C, 700C, 701C, 702C, 703C, 704C, 705C, 706C, 70

that he had visited the area and observed a police car nearby. He stated that he was not sure of the exact location of the car, but he was sure it was in the area. He also stated that he was not sure of the exact location of the car, but he was sure it was in the area. He also stated that he was not sure of the exact location of the car, but he was sure it was in the area.

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receiving more to satisfy our shared needs than we could ever

[illegible]

the evidence showed that at the time of the illness the insured was sixty-seven years of age, under another provision of the policy he would be entitled to only one-half of the indemnity provided for in the policy.

The age of the insured at the time of the application was a material point either as a defense to any claim for compensation or as determining the amount which the insured was entitled to receive. Statements or admissions of plaintiff as to his age are competent and material evidence. Burke v. Hindman, 70 Ill. App. 496; Harvick v. Modern Woodmen of America, 158 Ill. App. 570. In ruling out and refusing to consider the defendant's offered evidence on this point the court committed reversible error.

Defendant also offered a release signed by the insured, which was refused admission in evidence. The release, dated March 11, 1932, was after the insured had made claim for disability caused by pneumonia, and it purported to release all claims made or to be made by the insured on the policy. The present claim is for a disease of the heart. A witness for plaintiff testified that the insured was suffering from a heart condition following pneumonia. The trial court should have found whether or not the release covered such heart condition. The release was competent evidence which should have been considered by the court.

Defendant was entitled to present all facts bearing upon the age of the insured and the release, and these facts should have been considered by the court. For the failure to do this, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

The evidence shows that the fact of the illness of the witness was a material factor in the decision of the jury to convict. The evidence is not only material but the testimony of the witness is also material. The evidence is not only material but the testimony of the witness is also material.

The fact of the illness of the witness was a material factor in the decision of the jury to convict. The evidence is not only material but the testimony of the witness is also material. The evidence is not only material but the testimony of the witness is also material.

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REVEREND AND HONORABLE

WITNESSES AND JUDGES, ETC.,

36639

THE NORTHERN TRUST COMPANY,
a Corporation,
Appellee,

vs.

MARY R. CAMERON et al.,

THE BOARD OF FOREIGN MISSIONS OF
THE PRESBYTERIAN CHURCH IN THE
UNITED STATES OF AMERICA, a
Corporation,
Appellants.

30
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

271 I.A. 597²

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

September 17, 1908, Anna E. McDivitt died leaving an estate and also a will, which among other things provided for an annuity of \$75 a month to be paid to her niece, Ruth Webster Lathrop. The niece was also to receive one-quarter of the body of the estate, contingent upon certain events.

July 9, 1930, the Circuit court, by decree, ordered a partial distribution of the corpus of the estate among the four beneficiaries named in the will, and that the payment of the annuity to the niece, Ruth Lathrop, should cease.

January 4, 1933, pursuant to certain proceedings, hereafter stated, an order was entered in effect restoring the payment of the annuity to Ruth Lathrop. Two of the beneficiaries, The Board of Foreign Missions of The Presbyterian Church in the United States of America and The Chicago Home for Incurables, appeal from this order, saying that the prior decree of July 9, 1930, determined the rights of the parties and terminated the annuity to Ruth Lathrop; that the court was without jurisdiction at a subsequent term to enter a decree contrary to the former decree, and that Ruth Lathrop is bound by the terms of that decree; also, that the order of January 4, 1933, is directly contrary to the intent of the testatrix as shown by her

THE AMERICAN TRUST COMPANY,
a Corporation,
Applicant.

vs.

RAY N. CAMPBELL, et al.,

THE BOARD OF TRUSTEES OF THE
THE TRUSTEES OF THE
UNITED STATES OF AMERICA,
Applicant.

IN SENATE
JANUARY 11, 1912

ST. I. A. 387

IN SENATE
JANUARY 11, 1912

December 17, 1907, Anne S. Campbell died leaving an estate and also a will, which made certain things provided for an annuity of \$75 a month to be paid to her niece, Mrs. Robert Campbell. The niece was also to receive one-quarter of the body of the estate, completed upon certain events.

July 7, 1910, the District Court, by decree, ordered a partial distribution of the corpus of the estate among the four parties. The will, and also the payment of the annuity to the niece, the niece, Mrs. Campbell, and also the estate.

January 4, 1912, pursuant to certain proceedings, decrees, and orders, an order was entered in effect restoring the payment of the annuity to Mrs. Campbell. Two of the beneficiaries, the Board of Trustees of the Presbyterian Church in the United States of America and the Chicago Board for International, appeal from this order, saying that the order of July 7, 1910, determined the rights of the parties and restricted the annuity to such extent; that the court was without jurisdiction of a subject as to enter a decree contrary to the former decree, and that this decree is based by the terms of that decree; also, that the order of January 4, 1912, is directly contrary to the intent of the testament as made by her

will and to its expressed directions.

The will provided for four annuities, and the trustee under the will was directed to pay them as follows:

To Mary R. Cameron, \$60 semi-annually
 To Otis Wheeler Comstock, \$75 each month
 To Isaac Turner Comstock, \$75 each month
 To the niece, Ruth Webster Lathrop, \$75 each month
 To Annie C. McDivitt, \$25 each month.

Subsequently Otis Wheeler Comstock died. The other annuitants named are still living. The will also provided that:

"Seventh: On the death of Mary R. Cameron, Otis Wheeler Comstock, Isaac Turner Comstock, and Annie C. McDivitt, if in the opinion of my Trustee the income of one-quarter of my estate at that time will amount to \$75.00 per month or more, then in that event, I devise and bequeath all the rest and residue of my estate, real, and personal, money, stocks, evidences of indebtedness and securities, one-quarter each to the following institutions and persons: The Board of Foreign Missions of the Presbyterian Church in the United States of America, as a memorial to my late husband, Samuel P. McDivitt, the income of which is to be used for the support of a medical missionary in the foreign field of work; The Chicago Home for Incurables, in the City of Chicago, as a memorial to the late Benjamin Day of Springfield, Massachusetts; Ruth Webster Lathrop and John Pelatiah Perit Lathrop. Each of the foregoing to be entitled to one-quarter as near as it is practicable to divide the same. In the event Ruth Webster Lathrop is living so that she may share in this distribution as indicated, then and in that event the payment from income to her as above indicated shall cease, and she shall take her share in this distribution, assuming that in the opinion of my Trustee as indicated, the income from her share of my estate shall be at least \$75.00 per month. Otherwise, my estate is not to be distributed during her lifetime, and she is to receive in that event the entire income from my estate during her life, and upon her death the principal is to be divided into four parts as nearly equal as possible and as above provided. In case of the death of Ruth Webster Lathrop or John Pelatiah Perit Lathrop leaving issue then surviving, then and in such case the issue of either shall take by representation the share which would come to either of them."

In October, 1929, certain demands were made upon the Northern Trust Company, trustee under the will, by counsel for Ruth Webster Lathrop, including a demand that there should be paid over to her one-quarter of the balance of the principal fund remaining in said estate after setting aside an amount sufficient to provide for the three other surviving annuitants, namely, Isaac Turner Comstock, Mary R. Cameron, and Annie C. McDivitt. At this time the annual income from the estate was about \$10,150, while the amount needed

annually to pay the annuities was, in the aggregate, about \$2290. The excess of the income after paying the annuities had been allowed to accumulate and was added to the body of the estate, the value of which at this time was about \$235,000.

When this demand was made the trustee filed its bill in the Circuit court, presenting the facts with reference to the estate and the demand of Ruth Lathrop; The Board of Foreign Missions and the Home for Incurables answered, denying that she was entitled to the payments she had demanded, and asking the court to construe the will. By her answer Ruth Lathrop set forth that she was the niece of the testatrix; that she had been employed as an associate professor in a medical school; that she was 68 years of age and not of robust health, and that she was in need of funds; she prayed that her answer be given the effect of a cross bill and that the trustee be directed to turn over to her one-quarter of the corpus of the trust estate after making due provision for the three surviving annuitants, and also one-quarter of the accumulated income in the hands of the trustee.

The cause was referred to a master, who heard evidence and recommended a decree substantially as prayed for in her answer and cross bill and a decree was accordingly entered. The court found that \$75,000 was a sufficient amount to furnish assurance to a moral certainty that the annuities would be paid, and that the balance of the trust fund could be disposed of in accordance with the provisions of the will and in such manner as would not violate the rights and interests of other legatees and devisees; the decree therefore ordered that the trustee should retain the sum of \$75,000 out of the trust estate as of September 17, 1929, and all net income accumulated since that date in order to secure the payment to the three annuitants, Isaac Turner Comstock, Mary R. Cameron and Annie C. McDivitt; that the remainder of the property should be divided into

annually to pay the interest on the same, in the amount of \$100,000, and the estate of the deceased after paying the interest had been \$100,000. The executor of the estate and was asked to the body of the estate, the value of which at this time was about \$100,000.

When this finding was made the executor filed the bill in the Circuit Court, presenting the facts with reference to the estate and the amount of the interest; the court of foreign relations and the case for immediate answer, saying that she was entitled to the payment and had demanded, and asking the court to construe the will. By her answer she admitted that she was the niece of the testatrix; that she had been employed as an assistant professor in a medical school; that she was 48 years of age and not of robust health, and that she was in need of funds; and prayed that her answer be given the effect of a cross bill and that the trustee be directed to hand over to her one-quarter of the corpus of the trust estate after setting aside provision for the three surviving annuitants, and also one-quarter of the accumulated income in the hands of the trustee.

The cause was referred to a master, and heard orally and recommended a decree substantially as prayed for in her answer and cross bill and a decree was accordingly entered. The court found that \$75,000 was a sufficient amount to provide annuities for a period certainly that the annuities could be paid, and that the balance of the trust fund could be allocated to the annuitants with the provision of the will and in such manner as would not violate the rights and interests of other legatees and devisees; the decree therefore directed that the trustee should receive the sum of \$75,000 out of the trust estate as of September 17, 1918, and all net income accumulated since that date in order to receive the payment to the three annuitants, James Arthur Hamilton, Miss M. Jackson and Annie C. Hamilton; that the remainder of the property should be divided some

four equal portions, one of these portions to be given to the Home for Incurables, another to the Board of Foreign Missions, another to Ruth Webster Lathrop, and the remaining portion claimed by John P. Lathrop (the brother of Ruth Lathrop), the fourth beneficiary named in the will, to be retained by the trustee to be distributed to him or to his issue at a later date in accordance with the provisions of the will. The provision of the decree directing the payment of one-quarter of the body of the estate to Ruth Lathrop included these words: "And thereupon the payment to said Ruth Webster Lathrop of said annuity of \$75 per month shall cease." This decree of July 2, 1930, also contained a provision that jurisdiction was reserved "for the following purposes, only, namely:

With reference to the sum of \$75,000 to be retained by the trustee as hereinabove decreed, and also with reference to that portion of the estate not now distributed but likewise retained by said trustee, said trustee is hereby authorized from time to time as it may be advised to apply to the court upon such notice to the parties hereto as the court may require for instructions touching the management or distribution of the said funds to be retained by it, or any portion thereof, or of the income therefrom, or any portion of such income."

The directions of this decree were followed by the trustee, and Ruth Webster Lathrop received from it, pursuant to the terms of the decree, approximately \$35,816.

The following year, on May 12, 1931, the trustee received another communication from counsel representing Ruth Lathrop, demanding that out of the trust fund (referring to the \$75,000 retained by the trustee) then in the hands of the trustee there should continue to be paid to her an annuity under the terms of the will at the rate of \$75 a month, unpaid since July 15, 1930, and one-third of the net income from the trust fund (exclusive of the share held for John P.P. Lathrop, or his sons or issue) which has accumulated since September 17, 1929.

Thereupon The Northern Trust Company, trustee, filed its petition in this cause in the Circuit court and asked for further

any other person, and all these persons to be given to the
Sons for themselves, and to the Sons of their children,
another to Ruth Robert's daughter, and the remaining portion divided
by John T. Lathrop (the brother of Ruth Robert), the latter being
likely named in the will, to be received by the trustee to be dis-
tributed to him or to his issue at a later date in accordance with
the provisions of the will. The provision of the second will
the payment of the interest of the body of the estate to Ruth Robert
included these words: "and whenever the payment to said Ruth Robert
her husband or said estate of the said income shall cease," this
decree of July 7, 1893, also contained a provision that jurisdiction

was reserved "for the following purposes, only, namely:
This reference to the sum of \$75,000 to be received by the
trustee as a reserve fund, and also with reference to the
portion of the estate not now distributed but likewise retained by
said trustee, and granted in a deed authorized from time to time
as it may be advised to apply to the said sum and money to the
parties named in the deed may require for instructions concerning
the manner of distribution of the said funds to be retained by
it, or any portion thereof, or of the income thereon, or any por-
tion of that income."

The provisions of this decree were followed by the trustee,
and Ruth Robert's husband received from it, pursuant to the terms of
the decree, about nearly \$40,000.

The following year, on May 12, 1894, the trustee received
another communication from counsel representing Lathrop, describing that
out of the first fund (retained to the \$75,000 retained by the
trustee) there is the sum of \$10,000 which should be paid to
be paid to her as monthly maintenance for the term of the will at the rate of
\$75 a month, commencing July 15, 1890, and one-third of the net
income from the said fund (exclusive of the interest paid for John T. Lathrop, or his wife or issue) which had accumulated since September
27, 1890.

Thereafter the trustee in that capacity, having filed the
petition in this cause in the District Court and asked for further

instructions with reference to this demand. The Board of Foreign Missions and the Home for Incurables filed their respective answers denying that she was entitled to the additional payments she was demanding. The answers set forth the provisions of the decree of July 9, 1930, in which proceeding Ruth Webster Lathrop was a party and in which decree it was provided that the annuity of \$75 a month should cease, and that she had accepted the sum of money so provided for in said decree to be paid to her; the answers prayed that the trustee be instructed to refuse her demands.

Her answer, as well as that of her brother, John P. P. Lathrop, requested the court to instruct the trustee to make payments to her of the monthly annuity of \$75. Some evidence was submitted to the chancellor in connection with the issues made, and on January 4, 1933, the decree in question was entered, directing the trustee to pay to Ruth Lathrop the annuity claimed by her, in the amount of \$75 a month for the period commencing July 15, 1930, and continuing to December 15, 1932, amounting to \$2175; and it was further ordered that, commencing January 15, 1933, the trustee should first apply the net income of the trust fund set aside for said purpose to the payment of the annuities to Mary R. Cameron, Isaac Turner Comstock, and Annie C. McDivitt, in the respective sums called for by said will, and thereupon should pay to Ruth Webster Lathrop the annuity of \$75 a month, "or such portion thereof as such net income will suffice to pay after the payments to Mary R. Cameron, Isaac Turner Comstock, and Annie C. McDivitt aforesaid; such payments to said Ruth Webster Lathrop to continue so long as there shall be from time to time any surplus of net income of and above the amounts required to meet the aforesaid annuities to Mary R. Cameron, Isaac Turner Comstock, Annie C. McDivitt." As stated, the Board of Foreign Missions and the Home for Incurables present this appeal from this decree.

The order of January 4, 1933, was, with respect to the annuity of Ruth Lathrop, contrary to the provision of the decree of July 9, 1930. The prior decree, procured at her solicitation, awarded to her a portion of the corpus of the estate amounting to over \$35,000, and when the decree provided that thereupon her annuity should "cease" it could mean nothing else than that upon receiving her share of the corpus of the estate the annuity should be ended. If this had not been intended, it would have been very easy to include in the decree apt words to indicate that the payment to her of a lump sum should not affect her annuity. Such words were not used, and the conclusion is clear that the prior decree terminated and ended the payment of any annuity to her. This being so, the chancellor had no jurisdiction at a later term of court to enter a decree changing the interests of the parties determined by the prior decree. It has been said in many cases that a decree once determining the rights of parties cannot be changed at a subsequent term of court. People v. Clark, 268 Ill. 156; Tosetti Brewing Co. v. Koehler, 200 Ill. 369; Rode v. Eftimoff, 267 Ill. App. 466; Nelson v. Arcola State Bank, 261 Ill. App. 421.

Counsel for Ruth Lathrop invoke the provision in the decree of July 9, 1930, which reserved jurisdiction with reference to the sum of \$75,000 retained by the trustee to pay annuitants, with particular reference to the language authorizing the trustee to apply to the court for directions touching the distribution of the funds "or of the income therefrom, or any portion of such income." This reservation was to enable the trustee to obtain directions with reference to distributing any portion of the \$75,000 fund or income therefrom from time to time among the remaindermen as the annuitants should die. Upon the death of any of the three remaining annuitants and the consequent termination of such annuity, this question would at once arise; also, upon the death of the last surviving annuitant,

the trustee would seek directions from the court how to distribute this special trust fund and all accumulations of income. The chancellor did not reserve the right to revive the annuity to Ruth Lathrop which the decree had specifically said should cease.

We cannot accept the definition of the word "cease" as meaning that the trustee should make no more payments until further instructed by the court. To arrive at the correct meaning of the word we must consider it in its context and the circumstances in which it was used. Evidently the word was used in the decree with the same meaning it had when used in the will. There it meant that when Ruth Lathrop received a share of the body of the estate, this would be in lieu of any annuity, which annuity should thereupon end.

Counsel for Ruth Lathrop argue that it was the intention of the chancellor to provide for a continuing annuity to her because the decree ordered retained by the trustee \$75,000, the income from which should pay the annuities; and it is said that the income from this \$75,000 equals the total amount of the annuities, including an annuity to Ruth Lathrop. This argument might have weight if it were not for the fact that the \$75,000 of securities retained has shrunk in value to approximately \$60,000, as shown by the testimony of the vice-president of the trustee. The amount produced by this special fund at the time of the last decree was somewhat doubtful. This decree recognizes this in providing that the annuity to Ruth Lathrop shall be paid out of any net income left after paying Mary H. Cameron, Isaac Turner Comstock and Annie C. McDivitt, and such payments to her shall continue only so long as there shall be any surplus of the net income above the amount required to meet the aforesaid annuities.

Another reason requiring the reversal of the decree is that it directs the trustee to make payments directly contrary to the intention of the testatrix as clearly shown in her will. Referring to the provision of the will which directs the distribution of the

the trustee would have discretion from the court and to distribute
this special trust fund and all accumulations of income. The
trustee did not reserve the right to revise the annuity to which
Lathrop was entitled and specifically said "annuity" as
the amount of the annuity of the word "annuity" as
meaning that the trustee should make no more payments until further
instruction by the court. In view of the correct meaning of the
word as first used it is in the present and the circumstances in
which it was used. Evidently the word was used in the sense with
the same meaning it had when used in the will. There is no doubt
when Ruth Lathrop received a share of the body of the estate, this
would be in lieu of any annuity, which annuity should therefore end.
Concededly for Ruth Lathrop it was that it was the intention of
the trustee to provide for a continuing annuity to her because
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in value to approximately \$50,000, as shown by the testimony of the
vice-president of the trustee. The amount provided by this special
fund at the time of the last decree was somewhat doubtful. This de-
gree recognizes this in providing that the annuity to Ruth Lathrop
shall be paid out of my net income after paying Mary H. Lathrop,
James Turner, Joseph and Maria L. Lathrop, and such expenses as
her shall require only so long as there shall be any income of the
net income from the trust retained to meet the annuity of the
trust. Another reason for the retention of the fund is that
it directs the trustee to make payments directly out of the in-
come of the trust as early as possible in her will. In view
of the provision of the will which directs the distribution of the

body of her estate among the remaindermen, it will be noted that this distribution is to take place upon the death of the annuitants, Mary R. Cameron, Otis Wheeler Comstock, Isaac Turner Comstock, and Annie C. McDivitt. When all these had deceased, if in the opinion of the trustee the income of one-quarter of the estate would produce \$75 a month, then the remainder of her estate should be divided among the four beneficiaries named. This clearly indicates an intention on the part of the testatrix that Ruth Lathrop should receive from the body of the estate an amount which would produce at least an income of \$75 a month; the amount of the estate received by her was to be the equivalent of the annuity of \$75 a month. Now, when she procured the acceleration of this distribution before three of the annuitants had died, she took her share subject to the same condition, namely, in lieu of the monthly annuity, which should end. The will provides that when she takes her share of the body of the estate, "then and in that event the payment from income to her, as above indicated, shall cease."

The intention of the testatrix is also found in the fact that the provisions for the payment of annuities direct that such annuities shall be paid during the lifetime of the annuitant except as to the annuity to Ruth Lathrop, thus indicating that upon her receipt of a portion of the body of the estate her annuity should cease although she were living.

It should be noted that the share of the estate received by her was over \$35,000, which would produce, at a moderate estimate, approximately \$1050, or more than \$75 a month. Should she receive in addition an annuity of \$75 a month, she would receive an income of approximately \$160 a month, which was certainly never intended by the testatrix. There is not a line in the will indicating that prior to the death of all the annuitants Ruth Lathrop should receive more than \$75 a month.

body of the estate when the remaindermen, it will be noted that this distribution is to take place upon the death of the surviving Mary E. Gannon, City Treasurer, deceased, leave further testament, and Anne E. Gannon, it is provided, when all income has been received, it is the intention of the trustee the income of one-quarter of the estate would be paid to the estate, and the remainder of her estate should be divided among the four beneficiaries named. This clearly indicates an intention on the part of the testatrix that such income should be received from the body of the estate and should not be paid at least an income of \$75 a month; the amount of the estate received by her was to be the equivalent of the annuity of \$75 a month. Now when the proceeds of the liquidation of this distribution before three of the beneficiaries had died, and had her estate subject to the same condition, namely, in lieu of a monthly annuity, which should end. The will provides that one and a half per cent of the body of the estate, "then and in that event the payment from income to her, as above indicated, shall cease."

The intention of the testatrix is also found in the fact that the provisions for the payment of annuities direct that such annuities shall be paid during the lifetime of the annuitant except as to the annuity to John Gannon, which shall continue until such receipt of a portion of the body of the estate but annuity shall cease although she were living.

It should be noted that the whole of the estate received by her was over \$25,000, which would produce, at a moderate estimate, approximately \$1000 a month. It was then \$75 a month. Should she receive in addition an annuity of \$75 a month, she would receive an income of approximately \$1075 a month, which was certainly never intended by the testatrix. There is not a line in the will to suggest that prior to the death of all the beneficiaries that the body should receive more than \$75 a month.

The will also provides that there shall be no distribution upon the death of the annuitants if, in the opinion of the trustee, the income of one-quarter of the estate should not amount to \$75 a month or more. This indicates that the share of the estate coming to Ruth Lathrop should be sufficient to produce \$75 a month, the amount of the annuity she had been receiving before distribution. This emphasizes the intention of the testatrix that the share coming to her should be in lieu and the equivalent of the annuity of \$75 a month.

As indicated above, the decree of January, 1933, does not unconditionally order an annuity of \$75 a month paid to Ruth Lathrop, but such payments are to be contingent upon there being a surplus of income over and above the amounts necessary to pay the annuities to the other annuitants. They have priority over her, and, if there is no surplus after their requirements are met, she gets nothing. Such a condition is contrary to the express direction contained in the will and certainly was not contemplated by the testatrix.

Eminent counsel argue in support of the decree upon general equitable grounds, but these cannot prevail against the clear intention of the testatrix. It is a cardinal rule that the directions contained in a will must, wherever possible, prevail even though other considerations might suggest a different disposition of property.

The decree of July 9, 1930, provided that the body of the estate should be disposed of in such manner "as will not violate the rights and interests of other legatees and devisees." Upon the death of the three specific annuitants still living, the four remaindermen will each be entitled to one-quarter of the remaining corpus of the estate. They are entitled to have that remaining corpus kept unimpaired from any payments made from it or from the income derived from it which are not clearly provided for by the will.

For the reasons indicated the decree entered January 4, 1933, is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

The will also provides that there shall be no distribution upon the death of the testatrix if, in the opinion of the trustee, the income of one-quarter of the estate should not amount to \$75 a month or more. This indicates that the value of the estate coming to her at her death should be sufficient to produce \$75 a month, the amount of her annuity and has been received before distribution. This expresses the intention of the testatrix that the estate coming to her should be in lieu and the annuity of \$75 a month.

As indicated above, the decree of January, 1932, does not unconstitutionally either an annuity of \$75 a month or to her at her death but such payments are to be contingent upon there being a surplus of income over and above the amount necessary to pay the annuity to the other beneficiaries. They have priority over her, and, if there is no surplus after their respective shares are paid, she gets nothing. When a condition is contained in the express direction contained in the will and certainly was not contemplated by the testatrix, a court cannot agree in support of the decree upon technical grounds, but there cannot prevail against the clear intention of the testatrix. It is a cardinal rule that the direction contained in a will must, wherever possible, prevail even though other considerations might suggest a different disposition of property. The decree of July 9, 1932, provided that the body of the estate should be disposed of in such manner "as will not violate the rights and interests of other legatees and devisees." Upon the death of the three residuary beneficiaries still living, the four remaindermen will each be entitled to one-quarter of the remaining corpus of the estate. They are entitled to have that remaining corpus paid and raised from any amounts held from it or from the income derived therefrom which are not already provided for by the will. For the reasons indicated the decree entered January 4, 1932, is reversed.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

THOMAS JAKUBOWSKI,
Plaintiff in Error.

3/

ERROR TO MUNICIPAL COURT
OF CHICAGO.

271 I.A. 597³

MR. PRESIDING JUSTICE McSURNKY
DELIVERED THE OPINION OF THE COURT.

Defendant was charged with unlawfully carrying, concealed on or about his person, a revolver. Upon trial by the court he was found guilty and sentenced to the House of Correction and fined \$150; he asks for a reversal. Defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty. Examination convinces us that the point is well taken.

Carl Gustafson, complaining witness and apparently a relative of defendant, testified that at about two o'clock on the morning of December 5, 1932, the defendant came to his home and sought to gain admittance; that he recognized the voice of defendant and refused to open the door and defendant called to him that unless the door was opened he, defendant, would kill the complaining witness; that he then called the police and allowed defendant to enter his house; that he did not see any gun on or about the person of defendant.

The arresting officers testified that upon arriving at the home of complaining witness they found defendant in the hallway; that they searched him and did not find any weapon upon his person; that about five feet away from defendant, on a trunk under a piece of cloth, they found a fully loaded revolver; that defendant denied owning the gun or that he knew anything about it; that no one identified the gun and they were unable to ascertain to whom it belonged.

Defendant testified that he went to the house of the complaining witness, a relative, to settle some differences between

them; that he never made the statement that unless the door was opened he would kill the complaining witness; that the gun found by the officers was about seven feet away from him, covered with several pieces of cloth or burlap; that he had never seen the gun and never owned one and had no knowledge as to whom it belonged; that he was not near the place where the gun was concealed.

While we may have some doubt as to the accuracy of the principal witnesses, yet upon the record we must conclude that the evidence fails to show that the gun belonged to the defendant, and was so near him that he could have reached it without moving. In People v. Mismoth, 322 Ill. 51, it was held that before there can be a conviction under the statute the firearm must be in such proximity to the accused as to be within his easy reach and under his control. And in People v. Lake, 332 Ill. 617, it was held that it was an essential provision of the statute that the firearm "be carried concealed on or about the person of the accused."

It is possible that defendant owned the revolver and placed it upon the trunk, covering it up, but this is only conjecture. Guilt must be placed upon facts proved beyond a reasonable doubt. People v. Klein, 292 Ill. 420.

The judgment of the Municipal court is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

ANN HAWKINS,
Defendant in Error,
vs.

EDGAR McCLUN,
Plaintiff in Error.

32
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

271 I.A. 598¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against William McClun and Edgar McClun to recover damages for personal injuries resulting from an automobile accident. The suit was dismissed as to William McClun; there was a jury trial, a verdict and judgment in plaintiff's favor for \$3,000, and defendant appeals.

The record discloses that about 1:30 o'clock on the morning of April 27, 1930, plaintiff and her small daughter were riding south in South Park avenue in a car driven by her husband, and as they were crossing 69th street the car was struck by an automobile being driven west in 69th street by defendant. Plaintiff and her daughter were both injured and each brought suit; and on April 23, 1932, we affirmed a judgment in favor of the daughter against defendant.

(No. 35384, Hawkins, a Minor, by her next friend, v. Edgar McClun.)

In that opinion we discussed the facts, which are the same as those in the case before us, and passed upon a number of propositions of law which are substantially the same as the contentions now made. In these circumstances it will be unnecessary to recite the evidence except briefly.

As the case went to the jury there were three counts left in the declaration. The first charged defendant with the negligent operation of the automobile in 69th street, in Chicago; another count charged defendant with wilful and wanton conduct in the operation of the automobile, and in the third defendant was charged with the violation of a city ordinance which required persons driving

AND CARRIED,
 JOHN W. BROWN, JR.,
 vs.
 JOHN W. BROWN, JR.,
 Plaintiff in error.

IN THE COURT OF THE COMMON PLEAS
 OF THE COUNTY OF COLUMBIA

271 I.A. 208

THE COURT OF COMMON PLEAS OF THE COUNTY OF COLUMBIA.

Plaintiff brought an action against Defendant and

Defendant moved to recover damages for personal injuries resulting

from an automobile accident. The case was assigned to William

McGinn; there was a jury trial, a verdict and judgment in plain-

tiff's favor for \$1,000, and defendant appealed.

The record is as follows: About 1:15 o'clock on the morning

of April 17, 1930, plaintiff and her small daughter were riding south

in South Park Avenue in a car driven by her husband, and as they

were crossing 68th Street the car was struck by an automobile being

driven west in 68th Street by defendant. Plaintiff and her daughter

were both injured and each brought suit; and on April 22, 1930, we

affirmed a judgment in favor of the daughter against defendant.

(No. 12345, McGinn v. Brown, Jr., 271 I.A. 208.)

In that opinion we discussed the facts, which in the case we found

to be that plaintiff and her daughter were crossing 68th Street

and that defendant was driving west on 68th Street at the time

the accident occurred. It will be unnecessary to review the evi-

dence except briefly.

As the case came on for jury trial three weeks later

in the decision. The jury charged defendant with the negligence

operation of the automobile in 68th Street; in finding; another court

charged defendant with willful and wanton conduct in the operation of

the automobile, and in not being defendant was charged with the

violation of a city ordinance which required persons driving

automobiles west in 69th street to stop at South Park avenue, a stop street.

Plaintiff offered evidence to the effect that she was riding on the front seat of an automobile driven south by her husband on South Park avenue, in the west roadway of the street; that her young daughter was in the back seat; that the speed of the automobile was from eighteen to twenty miles an hour; that when the automobile was near the north cross-walk of 69th street, plaintiff's husband saw defendant's automobile coming west in 69th street at a speed of about fifty miles an hour; that it was then about fifty feet east of South Park avenue; that defendant did not stop at South Park avenue, although there was a large electric sign with the words, "Stop-Through Street" in large letters and the crossing was well lighted; that plaintiff's husband stepped on the gas, thinking he could pass in front of defendant's automobile, but there was a collision, the left front of defendant's car striking the left rear wheel of the car in which plaintiff was riding, swinging it around and tipping it over. A number of persons gathered, among them several street car men from a passing street car, and police also came; their testimony is to the effect that defendant was under the influence of liquor and endeavored to escape.

On the other hand, the substance of defendant's evidence is to the effect that he was driving west in 69th street at fifteen to eighteen miles an hour; that he stopped at the east side of South Park avenue and then proceeded across the street at about six or eight miles an hour, when the Hawkins car, driven by plaintiff's husband, came south at a speed of 45 to 50 miles, on South Park avenue, ran in front of defendant's car, caught his bumper, tore it off, and turned the automobiles around, the Hawkins car tipping over on its side; that defendant had not been drinking and did not try to escape. The evidence further tended to show that about

Witnesses were in fact killed on the east side of the street, and
stop street.
Plaintiff offered evidence to the effect that she was
riding on the front seat of an automobile driven south by her
husband on South Park Avenue, in the west portion of the street; that
her young daughter was in the back seat; that the speed of the auto-
mobile was from fifteen to twenty miles an hour; that when the au-
tomobile was near the north crosswalk of 10th Street, Plaintiff's
husband saw Plaintiff's automobile coming west in 10th Street at
a speed of about fifty miles an hour; that it was then about fifty
feet east of South Park Avenue; that defendant did not stop at
South Park Avenue, stopped there, and a large electric sign with
the words, "Stop-Through Street" in large letters and the crossing
was well lighted; that Plaintiff's husband stopped on the gas,
thinking he could pass in front of defendant's automobile, but there
was a collision, the left front of defendant's car striking the left
rear wheel of the car in which Plaintiff was riding, resulting in
at least one of them being killed. A number of persons gathered, among
them several officers but none from a police street car, and police
also came; that testimony is to the effect that defendant was under
the influence of liquor and intoxicated at the time.
On the other hand, the evidence of defendant's evidence is
to the effect that he was driving west in 10th Street at fifteen to
eighteen miles an hour; that he stopped at the east side of South
Park Avenue and then proceeded across the street at about six or
eight miles an hour, when the machine car, driven by Plaintiff's
husband, came within a speed of 25 to 30 miles, on South Park
Avenue, ran in front of defendant's car, struck the driver, and
it fell, and caused the automobile to stop, the driver and flying
over on the side; that defendant had not been drinking and did not
try to escape. The evidence further tends to show that about

eight o'clock on the evening prior to the accident plaintiff, a man twenty-six years old, who worked for his father in a real estate office on 63rd street, took his father's automobile and drove to the homes of several of his friends, picking up three young men and two young ladies; that they then drove around the city; that three of the six persons were taken home and three of them were in the automobile at the time of the accident. Five of the six persons who had been riding in the car testified that there had been no drinking and that plaintiff was not intoxicated at the time in question. Pictures of the two automobiles as they appeared after the collision were introduced in evidence and are in the record before us.

The defendant contends that the court erred in overruling his motion for a directed verdict at the close of all the evidence, or that in any event the judgment should be reversed because the overwhelming weight of the evidence is against the verdict of the jury. We think neither of these contentions can be sustained. The evidence was in sharp conflict. Obviously the court could not weigh the evidence - that is for the jury, - and he could not direct a verdict for either side. Malhstedt v. Ideal Lighting Co., 271 Ill. 154; Libby, McNeill & Libby v. Cook, 222 Ill. 206; Walldren Express Co. v. Krug, 291 Ill. 472. Nor can we say that the verdict of the jury in favor of plaintiff is against the manifest weight of the evidence. The jury saw the witnesses on the witness stand and heard them testify. Their finding in favor of plaintiff was approved by the trial Judge, a man of ability and experience. They were in much better position to determine the facts in the case than are we in a court of review where we have only the printed page before us. In these circumstances we think it is equally obvious that we would not be warranted in disturbing the verdict and judgment on the ground that they are contrary to the manifest weight of the evidence.

at a block on the ... of the ...
 and ...-six years ...
 estate office on ... street, took his father's ...
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 overwhelming weight of the evidence is against the verdict of the
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 the evidence - that is for the jury, - and he could not direct a
 verdict for either side. Wainwright v. Ideal Lumber Co., 271 Ill.
124; 111 Ky., 222; 111 Ill. 202; 211 Ky. 222.
Co. v. King, 271 Ill. 471. For one we say that the verdict of the
 jury in favor of disability is against the manifest weight of the evi-
 dence. The jury saw the witnesses on the witness stand and heard
 them testify. Their finding in favor of disability was supported by
 the trial judge, a man of ability and experience. They were in much
 better position to determine the facts in the case than are we in
 court of review and we have only the printed page before us. In
 these circumstances we believe it is highly probable that we would
 not be warranted in disturbing the verdict and judgment on the ground
 that they are contrary to the manifest weight of the evidence.

At the request of plaintiff the court submitted the following question to be answered by the jury: "Was the automobile in question, at the time and place in question, wilfully, wantonly and maliciously driven upon and against the car in which the plaintiff was riding as a passenger?" This was answered in the affirmative. Defendant contends that it was erroneous to submit this interrogatory because there was no evidence of wilful and wanton conduct on the part of defendant.

In the opinion rendered by this court in favor of plaintiff's daughter above referred to, where this same contention was made, and where a similar interrogatory was answered in the affirmative by the jury, we said: "What constitutes wilful and wanton conduct in such cases has been repeatedly stated. It does not necessarily mean that a defendant is actuated by ill will toward the plaintiff. It is such conduct as exhibits a reckless disregard for the safety of others. Mantonys v. Wilbur Lumber Co., 251 Ill. App. 364; Brown v. Illinois Terminal Co., 319 Ill. 326." If plaintiff's version of the speed of the two automobiles and his contention that defendant did not stop at South Park avenue, were adopted by the jury, we think the question whether defendant's conduct was wilful and wanton was for the jury. We are also unable to agree with the contention made by defendant that "where a general verdict is based on general negligence, and willful counts, the verdict cannot stand where there is no evidence of willful and wanton conduct." No. 35394, Hawkins v. McCluh, *supra*; Price v. Bailey, 265 Ill. App. 358. Moreover, the contention is inapt here because, as we have said, there was evidence from which the jury might reasonably find that the collision occurred through the wilful and wanton conduct of the defendant.

Complaint is also made that remarks of plaintiff's counsel were prejudicial, and that the court should have sustained defendant's motion to withdraw a juror and continue the case. The matter

At the request of Plaintiff the court admitted the following evidence to be answered by the jury: "Was the defendant in question, at the time and place in question, actually, voluntarily and without any driver and against the car in which the defendant was riding as a passenger?" This was answered in the affirmative. The witness testified that it was erroneous to submit this interrogatory because there was no evidence of willful and wanton conduct on the part of defendant.

In the opinion rendered by this court in favor of Plaintiff's daughter above referred to, where this same contention was made, and where a similar interrogatory was answered in the affirmative by the jury, we said: "That cannot infer willful and wanton conduct in such cases has been repeatedly stated. It does not necessarily mean that a defendant is motivated by ill will toward the plaintiff. It is such conduct as exhibits a reckless disregard for the safety of others." Langston v. Liberty National Bank, 251 Ill. App. 504; Illinois Central R.R. v. Liberty National Bank, 251 Ill. App. 504. It is Plaintiff's version of the speed of the two automobiles and the contention that defendant did not stop at South Main Street, were adopted by the jury, we think the question whether defendant's conduct was willful and wanton was for the jury. It is the jury's duty to weigh the evidence and by defendant's testimony that "there is a general verdict is based on a general finding, and willful conduct, the verdict cannot stand where there is no evidence of willful and wanton conduct." Re. 251 Ill. App. 504. However, the defendant's version, Langston v. Liberty National Bank, 251 Ill. App. 504. Therefore, the contention is based on evidence, as we have said, there is evidence from which the jury might reasonably find that the collision occurred through the willful and wanton conduct of the defendant. Plaintiff is also made that Plaintiff's counsel were prejudicial, and that the court should have excluded defendant's motion to withdraw a juror and consider the case. The matter

complained of in this respect is that during the cross-examination of one of defendant's witnesses counsel for plaintiff said: "Didn't you testify in the case of the little girl that lost her eye in this accident?" This was objected to, the objection sustained, and the question stricken. Under the facts as disclosed by the record in this case, we think the court was warranted in overruling defendant's motion. It is not every error that will authorize the reversal of a judgment. We think it cannot be said that the question put by counsel for plaintiff was prejudicial to defendant.

Defendant also argues that the court erred in giving instruction No. 3 at plaintiff's request. This instruction was based on the count that charged the violation of the city ordinance in defendant's failure to stop at South Park avenue. The argument is that the instruction was peremptory and authorized the jury to find the defendant guilty without requiring proof that the accident happened in the city of Chicago. Of course the judge, jury, witnesses and counsel and everyone who had anything to do with the case, knew that the accident occurred at the intersection of 69th street and South Park avenue, Chicago. The jurors are supposed to have qualifications required by the statute, and under no conceivable contention could the instruction have been prejudicial to defendant, even if we assume that the instruction did not specifically tell the jury the accident occurred in Chicago. The argument is entirely frivolous, and moreover, the instruction is not even subject to this alleged objection. The instruction told the jury what was alleged in the count charging violation of the ordinance of the City of Chicago, which designated South Park avenue as a stop street. It was alleged in the declaration that the accident occurred in Chicago, and the instruction told the jury that if they believed from a preponderance of the evidence, under the instruction of the court, that plaintiff had proved the averments of the count,

[illegible]

then they should find the defendant guilty.

A further point is made that the verdict is grossly excessive. The evidence tends to show that there was a cut on the left side of plaintiff's head over the temple, and her face was bloody; three stitches were taken by the physician to reduce the cut; there was also a cut on the arch of her left foot; she suffered pain in her side, ribs and back and over her right hip; adhesive tape was applied; she remained at the hospital three days, during which time X-ray pictures were taken. She testified that during those days she had terrible pains in her head, side and back. She was then taken home and put to bed where she stayed two days. She then went to get her daughter from the hospital and went back to bed and was in bed off and on for about three or four weeks. Other X-ray pictures were taken about four weeks after the accident, and other treatments were given her by the physician who treated her until September. At the time of the accident plaintiff was thirty-seven years of age and had never been sick. Plaintiff further testified that she still had pains in her head and back at the time of the trial, which was March 7, 1932, nearly two years after the accident. A Doctor who took X-ray pictures of plaintiff testified that the pictures showed a transverse fracture of the process of the fifth lumbar vertebra of the left side. He also testified as to other matters which the pictures showed indicating that plaintiff had suffered other injuries.

We have carefully considered the evidence in the record and argument of counsel. Obviously the amount of compensation plaintiff should receive is not the subject of mathematical computation. That question is one for the jury, and after a careful consideration of all the evidence of the record, we are unable to say that the verdict of the jury is so excessive as to warrant interference on our part.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J. and Hatchett, J., concur.

then they would find the defendant guilty.

A further point is made that the verdict is already ex-

clusive. The evidence tends to show that there was a cut on the

left side of defendant's head over the temple, and her face was

bleeding; these conditions were taken by the physician to indicate the

cut; there was also a cut on the top of her left foot; she sustained

bruises on her right arm, right and back and over her right hip; adhesive

tape was applied; she remained in the hospital three days, during

which three X-ray pictures were taken. The physician testified that

those days she was unable to get up, she was weak, stiff and back. The

was that certain items and that he had written and signed two days. The

then went to get her daughter from the hospital and went back to

bed and was in bed all night and on the second night of her recovery. Other

X-ray pictures were taken about two weeks after the accident, and

other testimony was given by the physician who treated her

until September. At the time of the accident plaintiff was thirty-

seven years of age and had never been sick. Plaintiff further tes-

tified that she still had pains in her head and back at the time of

the trial, which was March 7, 1937, nearly two years after the ac-

cident. A doctor who had X-ray pictures of plaintiff testified

that the pictures showed a fracture of the vertebrae in the process of the

third lumbar vertebra at the left side. He also testified as to

other matters and the evidence showed that plaintiff was seriously

and suffered other injuries.

It was further contended that the evidence in the record was

prejudicial to plaintiff. Objection to the amount of compensation plaintiff

should receive is not the subject of constitutional contention. That

question is one of law only, and after a careful consideration of

all the evidence of the record, we are unable to say that the ver-

dict of the jury is so excessive as to require intervention on ap-

peal.

The judgment of the district court of Cook County is affirmed.

Reversed.

Reversed.

36568

WARREN HERRICK,
Appellee.

vs.

THEODORE DICKINSON,
Appellant.

33
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

271 I.A. 598²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover \$5958.83 claimed to be due him for materials furnished and labor performed in and about the landscape gardening of defendant's residence and grounds located north of Libertyville.

Defendant, under counter claims and set-off, claimed that plaintiff was indebted to him in the sum of \$5769.44. There was a jury trial and a verdict in favor of plaintiff for \$3750, with interest at five per cent from April 2, 1930, to November 26, 1932. Judgment was entered on the verdict and defendant appeals.

The record discloses that plaintiff was for many years engaged in the business of landscape gardening. Defendant had a tract of about 80 acres of land north of Libertyville, Lake County, Illinois, which he was improving for residence purposes, and in 1929 he employed plaintiff to furnish material and do work in and about improving defendant's premises. Plaintiff began this work about July 15, 1929, and did the last work December 14, 1929, and for the work and materials sent defendant bills which were paid as follows: August 4, 1929, \$1008.77; September 5, \$7668.24; October 25, \$4684.32; November 11, \$5670.46, and January 1, 1930, \$4542.40, a total of \$23,570.19. Each of these bills was itemized, showing the number of days and the number of men employed, etc., and 10 per cent was added to each of the bills. Plaintiff did practically no work during January and February, 1930, but on February 24th

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REPRODUCED FROM THE NATIONAL ARCHIVES AT COLLEGE PARK, MARYLAND

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

[illegible]

1993-1994

defendant wrote plaintiff a letter stating that he wished plaintiff would cover defendant's garden with manure and spade or plow it under. The area of the ground was given as 280 by 400 feet and it was stated that defendant understood plaintiff was to bill him for the work at actual cost plus 10 per cent for plaintiff's profit. Two days afterward defendant's representative wrote plaintiff concerning the matter, and a talk was had between them a few days later when they looked over the ground, and plaintiff was requested to write defendant giving an itemized statement as to what the proposed work was to cost; March 7, 1930, plaintiff wrote defendant such a letter. The work to be done was spreading manure on the garden, excavating for a pond and certain other work. It was stated in the letter, "Manure at \$4.00 per yard. To the above will be added a commission of 10%." Plaintiff had commenced the work about three days prior to this letter, and began to haul the manure and spread it on the garden. About the 19th of the month defendant advised plaintiff to do no further work, which request was complied with. Plaintiff then submitted his itemized bill for the work beginning March 4th and ending March 19th, showing a total of \$5858.83, for which plaintiff sues. Some of this amount was made up of money spent by plaintiff in employing persons to do part of the work.

The principal controversy in this court is the charge made by plaintiff for the manure spread on the garden, plaintiff taking the position that he used the proper quality and quantity. On the other hand, defendant's position is that a great part of the manure was of inferior quality and that practically twice as much was used as was reasonably necessary. Each put in evidence to sustain his respective theory. Plaintiff produced witnesses who testified in substance that the manure was of good quality and that a proper quantity of it was spread on the garden. The defendant

offered evidence to the effect that a great part of the manure was of inferior quality and that practically half of the amount was unnecessary. Defendant also offered evidence tending to sustain his defense of counter claim and set-off, that certain work done by plaintiff, other than the spreading of manure, was not performed in a good and workmanlike manner, as a result of which defendant was put to considerable expense in and about seeing that the work was all done in a good and workmanlike manner.

Defendant contends that the court improperly excluded evidence offered by him as to the value of the quality and quantity of the manure furnished. The evidence showed that plaintiff purchased the manure in the neighborhood from farmers and defendant sought to elicit what plaintiff had paid them for it. The court sustained objections to these questions and we think properly so. Plaintiff's position was that the contract between the parties was in writing, as evidenced by the letter written by him to defendant dated March 7, 1930, above referred to, in which it was specifically stated that plaintiff would make a charge of \$4 a cubic yard for the manure, to which would be added a commission of 10 per cent. Defendant's position is that this letter must be considered in the light of his letter to plaintiff of February 24th, to which also we have referred, in which he stated that he understood that plaintiff was to furnish the manure and spread it on the garden at actual cost to plaintiff plus 10 per cent for plaintiff's profit.

The undisputed evidence is that after plaintiff had received defendant's letter of February 24th, he had a conference with defendant's representative, going over the garden, and at that time he was requested to submit an itemized statement of the work and what it was to cost defendant; this plaintiff did by his letter of March 7th. No complaint having been made by defendant after receipt

offered evidence in the office of a great part of the matter was
of inferior quality and was practically lost of the amount was
unrecoverable. The evidence also offered was located in various
the absence of proper labels and tags, and the evidence was not
by quality, or in some the quantity of evidence, was not destroyed
in a case and was not in a manner, as a result of which the evidence was
not to be considered as evidence in and about which the case was
all done in a proper and workmanlike manner.

Defendant's evidence was the result of a very carefully examined evi-
dence offered by him as to the value of the property and quantity
of the property involved. The evidence showed that plaintiff pur-
chased the property in the market from various and different
sources to effect what plaintiff had said was the case. The court
admitted evidence of these questions and as to the property so
plaintiff's position was that the property between the parties was
in dispute, as evidenced by the facts which he has to establish
that since 1911, he has been referred to, in which it was specifically
stated that plaintiff would make a charge of 10 cents per day for the
amount, in which case he asked a commission of 10 per cent. De-
fendant's position is that this latter must be considered in the
light of his letter to plaintiff of February 20th, 1911, in which also
he has referred, in which he stated that he understood that plaintiff
was to be paid for the property and agreed to do the same as stated
and to plaintiff that he had not the plaintiff's goods.

The evidence offered in this case after plaintiff had removed
defendant's evidence of February 20th, 1911, as was a conference with de-
fendant's representative, during over the property, and at that time
he was requested to submit an itemized statement of the goods and
what is now in the defendant's possession; this plaintiff did by the letter of
March 27th. The defendant having been told by defendant at that time

of the letter of March 7th, and plaintiff having furnished the manure and spread it on the garden, we think the price was \$4 a cubic yard, and that this was a question of law for the court. Our conclusion is further strengthened by the fact that plaintiff during August, 1929, had furnished a great many yards of manure to defendant, as shown by an itemized bill rendered and paid by defendant, wherein plaintiff charged defendant \$4 a yard for the manure. These items are: August 8, 36 yards, August 13, 30 yards, August 14, 36 yards, August 15, 42 yards, August 16, 24 yards, August 17, 18 yards, August 19, 30 yards, August 20, 48 yards, August 21, 60 yards, August 22, 48 yards, August 23, 102 yards, August 24, 54 yards, August 26, 102 yards, August 27, 54 yards, August 28, 24 yards, August 29, 18 yards, August 30, 25 yards. All of this plaintiff billed the defendant at \$4 a cubic yard and it was paid for at that price. Under these circumstances we think it obvious that when defendant received the letter of March 7th he understood the charge was to be \$4 a cubic yard plus 10 per cent.

After witnesses for defendant had testified that a considerable part of the manure was of inferior quality and that a great deal more had been spread on the garden than was reasonably required, he offered to show the reasonable value of the manure on the theory that since he kept and used it he was required to pay the reasonable value of it. This evidence was objected to and the objection was sustained. Plaintiff's contention is that the ruling was correct because the evidence shows that defendant had, through his representative, inspected the manure on the garden after it was spread, as to quality and quantity, had approved both, and therefore, having accepted the work as done, evidence tending to show the reasonable value of the manure was inadmissible. The difficulty with this contention is that while plaintiff produced witnesses who gave testimony to sustain

his contention in this respect, defendant's representative denied that he had approved of the quality or the quantity of the manure. But there is a valid reason why the evidence was not admissible.

Defendant in his reply brief says that under clause 3 of section 44 of the Uniform Sales act, he might take part of the manure for which he would be required to pay the reasonable value, and reject part of it. And that sub-clauses (a) and (b) of clause 1 of section 69 of the Act point out the method by which he is to obtain these rights when sued for the purchase price. Clause 3 of section 44 provides that, "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole." And the clauses of section 69, above referred to, provide: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election -

"(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of price.

"(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty."

And defendant's argument is that since the manure was not of the quality purchased and that more was spread on the garden than required, there was a breach of warranty for which the clauses just quoted point out a remedy. The difficulty with this contention is that by clause 3 of section 69 it is provided that where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller. Section 48 of the Uniform Sales act provides what

the condition in this respect, although a representative finding that the defendant is not guilty of the crime of the offense, but there is a right to know why the defendant was not acquitted.

Defendant in his reply brief says that under clause 6 of

section 14 of the Criminal Code Act, he was not held liable for the

crime for which he was held liable in the first trial, and that the

first trial was not a retrial, and that the second trial was a retrial

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"(b) The finding of the jury in the first trial was a finding of a

guilty verdict, and that the finding of the jury in the first trial

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shall constitute an acceptance of goods and it is that, "The buyer is deemed to have accepted the goods when *** he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." And section 49 of the Act provides that the acceptance of goods does not bar an action for damages by the buyer if the buyer within a reasonable time notifies the seller that he claims a breach of warranty, and that if he does not give such notice he has no rights. That section is as follows: "acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the *** sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

In the instant case there is no evidence that the defendant ever made any complaint to plaintiff as to the quality or quantity of the manure, and apparently the first time this was brought to plaintiff's attention was when defendant filed his plea of counter claim and set-off, which was June 9, 1931. The manure was delivered and spread on the garden in March, 1930, and it is obvious that if, under the Uniform Sales act, defendant would avail himself, he should have notified plaintiff long before he did; not having done so, he cannot now complain of the quality or quantity of the manure. Canada Maple Exchange, Ltd. v. Scudder Syrup Co., 223 Ill. App. 165; Goodlatte v. Acme Sales Corp., 229 Ill. App. 610; Genuine Panama Hat Works v. Paragon Hat Co., 245 Ill. App. 531.

Since we hold that under the facts in this case the defendant, having made no complaint as to the quality or quantity of the manure within a reasonable time, lost his right to recoup, it is not necessary for us to pass upon the instructions complained of, because the judgment must be affirmed. But in any event, we think the jury understood the issues involved, so that any inaccuracy was not prejudicial to defendant.

Before entering judgment we think we ought to say that the thickness of the layer of manure spread on the garden ought not to be the subject of opinion, speculation or conjecture, as it was on the trial and in this court, because it is subject to mathematical computation. Witnesses for plaintiff testified that the layer of manure was about six inches, while witnesses for the defendant testified that it was from seven to eight inches. Further, witnesses speculated as to whether there were two and one-half or three acres of ground in the garden. This speculation ought not to be indulged in. It is agreed that the plot of ground was 280 by 400 feet, which is 112,000 square feet. There were 1128 cubic yards of manure. It is conceded that the manure was spread evenly over the ground and therefore the layer would be 3.201 inches and not six, seven or eight inches, as the witnesses testified. If the garden contained exactly two and one-half acres, the depth of the manure would be 3.35+ inches.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

36615

CHARLES HUNTER,
Plaintiff-Appellee,

vs.

JOSEPH SCHOEN,
Defendant-Appellant.

34
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

271 I.A. 598³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by him as a result of being struck and injured by an automobile driven by defendant. The case was tried before the court without a jury, and there was a finding and judgment in plaintiff's favor for \$5,000, and defendant appeals.

The record discloses that about three o'clock on the afternoon of July 9, 1931, defendant was driving his automobile north in the Outer Drive of Grant Park, Chicago, when the right-hand end of the front bumper came in contact with a post located at the southeast corner of the Outer Drive and Monroe street, slipped off the post and struck plaintiff, injuring him.

Plaintiff's theory of the case was that he had walked from the place where he lived, 1008 West Monroe street, down to the Outer Drive on his way to Lake Michigan, which is a very short distance east of the Outer Drive at Monroe street; that there was a large fence post standing at the southeast corner of the two streets; that plaintiff had just passed to the east of this post, stopped for a few moments to permit the parking of an automobile a short distance in front of him, and while he was thus standing defendant's automobile, which was being driven north in Monroe street, from 12 to 40 feet west of the east curb, at about 20 to 25 miles an hour, struck the post, then glanced off, and struck and threw him to the ground.

On the other hand, defendant's theory was that he was driving north in Monroe street about two or three feet from the east curb at about eight or ten miles an hour, intending to park his car in a place immediately north of Monroe street, which was used for parking purposes; that when he was a short distance south of the post he suddenly saw plaintiff emerging from behind the post walking west, and in an endeavor to avoid hitting him defendant turned his car sharply to the east, coming in contact with the post, and the automobile slipped off the post and struck plaintiff.

Defendant contends that the declaration is not sufficient to sustain the judgment; that the finding and judgment is against the manifest weight of the evidence, and that the judgment is excessive.

The first count alleged that plaintiff, who was exercising all due care for his own safety, was standing "on the parkway off the highway on the east side of the Outer Drive at the foot of Monroe Street in Grant Park, Chicago, Ill." and charged the defendant with the negligent operation of the automobile. The second count was in substance the same, except that it charged defendant with wilful and wanton conduct in the operation of the automobile; and the third charged defendant with assault and battery of the plaintiff by striking him with the automobile.

Complaint is made to the first count in that it alleges that plaintiff was standing "off the highway" and that "There is no allegation as to how far off the highway the plaintiff was standing. He might have been 6 inches 'off' the curb as he admits he was, or he might have been 100 feet away." There are other objections of a similar nature. We think it obvious that these objections are entirely without merit and frivolous. Each of the counts is sufficient. We are equally clear that the contention of

with the boat, and the cable slipped off the post and struck
attendant turned his back quickly to the east, making in contact
post railing west, and in an endeavor to avoid hitting him
of the boat he suddenly saw a small object flying from behind the
used for pulling purposes; that when he was a short distance again
his ear in a short distance north of where he was, which was
next one at about eight or ten miles in front, intending to work
diving board is located about two or three feet from the
on the boat. He saw the boat and saw the boat and saw the boat

...revised

The above information was furnished to the Chicago Police Department on the date of the arrest of the defendant. The Chicago Police Department is currently conducting an investigation into the activities of the defendant and is seeking information from the public regarding the same.

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defendant that the evidence is wholly insufficient to sustain the charge of wilful and wanton conduct, and the charge of assault and battery, as alleged in the second and third counts, must be sustained because in no view of the evidence can it be said that defendant's conduct in driving the automobile showed a reckless disregard of the rights of plaintiff. And the affirmative answer to the special interrogatory submitted by plaintiff, finding that the defendant wilfully and wantonly operated, managed and controlled his automobile, is manifestly against the weight of all the evidence.

However, if the evidence warranted, the second count would be sufficient to sustain a finding and judgment although the defendant was guilty of but ordinary negligence, (Price v. Bailey, 265 Ill. App. 358; Levy v. Schikowski, 239 Ill. App. 447) since it is not always necessary to prove all the allegations of a count where more is alleged than need be proven. Weber Wagon Co. v. Kehl, 139 Ill. 644. And, as stated, the first count is sufficient to sustain a judgment if supported by the evidence.

The question remains as to whether the finding and judgment in plaintiff's favor to the effect that plaintiff was in the exercise of due care for his own safety, and the defendant guilty of actionable negligence, are against the manifest weight of the evidence. If we find that they are, then it is our duty to reverse the judgment. Donelson v. East St. Louis Ry. Co., 235 Ill. 625. Since we have reached the conclusion that there must be a new trial because the finding and judgment are against the manifest weight of the evidence, we will not discuss the evidence in detail. The substance of the testimony of plaintiff, Thomas G. McKenna and Frank Schickel is to the effect that defendant was driving his car north from 12 to 40 feet west of the east curb of the Outer Drive at a speed of from 20 to 22 miles an hour; that there was another automobile to the east and behind defendant's automobile and that defendant suddenly turned his car into the post; while defendant testified in substance

determining that the evidence is wholly insufficient to establish the
charge of willful and malicious conduct, and the charge of negligence and
battery, as alleged in the second and third counts, must be sustained
because in no view of the evidence can it be said that defendant's
conduct in driving the automobile showed a reckless disregard of
the rights of plaintiff. And the affirmative answer to the special
interrogatory submitted by plaintiff, finding that the defendant
willfully and maliciously injured, harassed and controlled his auto-
wife, is manifestly against the weight of all the evidence.
However, if the evidence warranted, the second count would
be sufficient to sustain a finding and judgment although the defend-
ant was guilty of but ordinary negligence. (Lytle v. Lytle, 203
Ill. App. 383; Levy v. Lehigh, 230 Ill. App. 417) since it is
not always necessary to prove all the allegations of a count where
more is alleged than need be proven. (Raymond Co. v. Ray, 139
Ill. 644. And, as stated, the first count is sufficient to sustain
a judgment if supported by the evidence.
The question remains as to whether the finding and judgment
in plaintiff's favor as to the effect that plaintiff was in the exercise
of due care for his own safety, and the defendant's liability of action-
wife negligence, are against the manifest weight of the evidence.
It is found that they are, and it is not necessary to reverse the judg-
ment. (Raymond v. First St. Lumber Co., 238 Ill. 688. Since we
have reached the conclusion that there must be a new trial because
the finding and judgment are against the manifest weight of the
evidence, we will not discuss the evidence in detail. The substance
of the testimony of plaintiff, Thomas G. Bennett and Frank Bennett
is to the effect that defendant was driving his car north from 12 to
40 feet west of the east curb of the main drive at a speed of from
25 to 35 miles an hour; that there was another automobile in the
east end of Bennett's driveway and that defendant suddenly
turned his car into the road; wife Bennett testified in substance

that he was driving his automobile from 2 to 3 feet from the east curb at from 8 to 10 miles an hour; that plaintiff was behind the post so that he could not be easily seen by defendant; that plaintiff suddenly emerged from back of the post, walking west, and defendant, thinking plaintiff was about to step in front of the automobile, suddenly turned the car into the post in an endeavor to avoid striking plaintiff. Defendant's testimony was corroborated in some respects by the witness, McCormick.

We have carefully examined all the evidence in the record and have taken into consideration the fact that the trial Judge saw and observed the witnesses when they testified, and have reached the conclusion that the finding, sustaining plaintiff's version, is against the manifest weight of the evidence. We think it is unreasonable to believe that defendant was driving at the speed testified to by witnesses for plaintiff, in view of the fact that it is undisputed that defendant was about to park his car a comparatively short distance from the post. We are also of the same view in reference to the testimony to the effect that defendant's car was a considerable distance from the east curb and suddenly turned into the post. The testimony of the defendant we think is reasonable when he says that he was going about 8 or 10 miles an hour, was about to park his car just north of Monroe street, and that he suddenly saw plaintiff emerge from behind the post, and turned to the right to avoid striking him. Holding, as we do, that the finding in favor of plaintiff is against the manifest weight of the evidence, the judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

36718

GEORGE H. ADAMSON,
Appellant,

vs.

THE GABRNER SCIENTIFIC CORPORATION,
A Corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 598⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$1,000 with interest thereon claimed to be due him for royalties under a contract entered into between him and defendant. Defendant denied liability and filed a set-off claiming \$3019.10 for labor and materials furnished plaintiff ^{and} for consultation with plaintiff relative to the manufacture of a device. There was a trial before the court without a jury, the court found against the plaintiff on his claim and against the defendant on its set-off. Judgment was entered against plaintiff for costs and he appeals. Defendant has assigned cross-errors.

The record discloses that on September 27, 1929, the parties entered into an agreement which recited that plaintiff had invented a certain new and improved sextant and had filed an application for letters patent and that the defendant was desirous of acquiring the exclusive right to manufacture and sell the sextant. The contract gave defendant the exclusive license to manufacture and sell the sextant, for which defendant agreed to pay plaintiff a royalty of 10 per cent of the gross sales. Defendant was to manufacture, advertise and sell the sextants with a view of building up a market for them. It was further provided that if the royalty amounted to less than \$1,000 for the second and subsequent years, defendant was to make up the deficiency so that plaintiff would receive at least \$1000. The evidence further shows that shortly after the contract was made defendant made a model and conferred

with the plaintiff, when it was found that there was something lacking in the sextant and it would have to be improved before it would be salable. Thereafter plaintiff and defendant's representative were in conference a number of times and the defendant made two other models which all the evidence shows without dispute were also unsalable because of some defect that had not been foreseen. There is further evidence in the record that defendant, at plaintiff's request, submitted the sextant to the officials of the Navy at Washington, D. C., with a view of having it adopted by the Navy, but without success. It is undisputed that no sextant was ever sold, the reason being that there was something wrong with the mechanism which rendered the sextant unworkable.

Plaintiff gave testimony to the effect that he did not request defendant to submit the sextant to the Navy officials, and that he had obtained prospective customers for three or four of the sextants.

Defendant's position is that the manufacture and sale of the sextants, as required by the contract, was abandoned by mutual agreement of the parties, both being of the opinion that the instrument needed improvements and alterations before it would be salable. It further appears from the evidence that plaintiff consulted defendant's representatives, especially Dr. Jacobson, a scientist employed by defendant, with reference to designing a certain computing instrument which defendant says "was to be used in connection with the sextant;" that under the contract the defendant was not required to do this work nor was it required to furnish certain material and labor in an endeavor to improve the sextant so as to make it salable. While there is some conflict in the evidence, we think the finding of the learned trial Judge, a man of experience and ability, ought not to be disturbed. He was in a much better position to determine the truth of the matter in controversy, having seen the witnesses and heard them testify, than

with the plaintiff, when it was found that there was something lacking in the account and it would have to be proved before it would be admissible. Therefore plaintiff and defendant's representatives were in conference a number of times and the defendant made two other motions which all the evidence shows without dispute were also inadmissible because of some defect that had not been foreseen. There is further evidence in the record that defendant, at plaintiff's request, submitted the account to the officials of the Navy at Washington, D. C., with a view of having it righted by the Navy. But without success. It is undisputed that no account was ever sent, the reason being that there was something wrong with the mechanism which rendered the account inadmissible. Plaintiff has testimony to the effect that he did not request defendant to submit the account to the Navy officials, and that he had obtained prepositive evidence for three or four of the accounts. Defendant's position is that the manufacture and sale of the accounts, as required by the contract, was rendered by mutual agreement of the parties, both being of the opinion that the instrument needed improvements and alterations before it would be admissible. It further appears from the evidence that plaintiff contacted defendant's representatives, especially Mr. Johnson, a solicitor employed by defendant, with reference to designing a certain computer instrument which defendant says was to be used in connection with the accounts; that under the contract the defendant was not required to do this work nor was it required to furnish certain material and labor in a device for to improve the account as it was made. While there is some conflict in the evidence, we think the finding of the learned trial judge, a man of experience and ability, ought not to be disturbed. He was in a much better position to determine the truth of the matter in controversy, having seen the witnesses and heard their testimony, than

are we, sitting in a court of review where we have but the printed page before us.

While defendant had the burden of proving its defense - that the contract had been abandoned by mutual agreement - we are unable to say the finding of the trial Judge that the defense had been sustained is against the manifest weight of the evidence; and in this view of the case, under the law we are not warranted in disturbing the finding. The defendant also had the burden of proving its set-off. There is no evidence that at any time did defendant suggest to plaintiff that he would be required to pay for any of the work done by defendant, above referred to, so that under the law we are unable to say the finding of the trial Judge against defendant on the set-off is against the manifest weight of the evidence.

We think all the evidence shows that the sextant was not salable; that defendant endeavored to improve it so that it would be salable but was unable to do so. Plaintiff was advised and consulted during most of the time. In these circumstances, and in view of the finding of the trial court, the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

36674

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

MAURICE A. BARNETT,
Appellant.

APPEAL FROM CRIMINAL COURT
OF COOK COUNTY.

271 I.A. 598⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This proceeding is under Section 89 of the Practice act which abolishes the writ of error coram nobis and provides that all errors of fact committed in the proceedings of a court of record, which by the common law could have been corrected by the writ of error coram nobis, may be corrected by the court in which the error was committed upon motion in writing made at any time within five years after the rendition of final judgment. A motion was presented in the form of a petition asking for a new trial in the Criminal court; answer was filed on behalf of The People, evidence was heard and the prayer of the petition denied, and defendant appeals to this court. Proceedings in this way in a criminal case has been approved in The People v. Crooks, 326 Ill., 266, and The People v. Moran, 342 Ill. 478.

Defendant with others was indicted and convicted in the Criminal court of Cook county of conspiracy and sentenced to the penitentiary; he sued out a writ of error to the Appellate court and to the Supreme court and both courts affirmed the judgment. (259 Ill. App. 650; 347 Ill. 127.)

The People challenged the jurisdiction of the Criminal court to entertain this motion, arguing that the conviction having been affirmed on writ of error by the Appellate and the Supreme courts, defendant has exhausted his remedy; that he had a choice between the ordinary writ of error and the writ of error coram nobis, but he cannot have both; citing Partlow v. State, 194 Ind. 172; Boyd v. Smyth, 200 Ia. 687; Land v. Williams, 12 S. & M. (Miss.) 362.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.
JAMES EARL RAY,
Appellant.

IN SENATE

January 11, 1968.

281 I.A. 268

ALL THE COURT REPORTERS HAVE BEEN ADVISED OF THE COURT.

This proceeding is under section 12 of the Practice Act which abolished the writ of error coram nobis and provides that all errors of fact committed in the proceedings of a court of record, which by the common law could have been corrected by the writ of error coram nobis, may be corrected by the court in which the error was committed upon a motion in writing made at any time within five years after the rendition of final judgment. A motion was presented in the form of a petition seeking for a new trial in the Criminal Court; answer was filed on behalf of the People, evidence was heard and the prayer of the petition denied, and defendant appeals to this Court. Proceedings in this way in a Criminal case have been approved in People v. Brown, 350 Ill. 2d 111, 112, and People v. Brown, 350 Ill. 2d 111, 112.

Defendant with others was indicted and convicted in the Criminal Court of each count of conspiracy and sentenced to the penitentiary; he was not a writ of error in the appellate court and to the Supreme Court and with others affirmed the judgment. (See Ill. Rev. Stat. 1967, ch. 112, sec. 127.)

The People emphasize the jurisdiction of the Criminal Court in exercising this power, arguing that the conviction having been affirmed on writ of error by the appellate and the Supreme Courts, defendant was exhausted his remedy; that he had a choice between the ordinary writ of error and the writ of error coram nobis, but he cannot now have both; citing People v. Brown, 350 Ill. 2d 111, 112; People v. Brown, 350 Ill. 2d 111, 112; People v. Brown, 350 Ill. 2d 111, 112.

These cases had under consideration the original common law writ of error coram nobis, and it was held that the court must be governed by the precedents established by the courts of England in relation to this writ, and that as long ago as 1761 it was there decided that the writ of error coram nobis will not lie after affirmance by the court of review, and this common law rule was applied in the cases cited.

However, section 89 of our Practice act abolishes the ancient writ of error coram nobis, and although the old procedure is followed, yet the statute fixes five years as the time within which a motion may be made under this statute. The statute does not except cases which have been passed upon by appellate tribunals. The fact that the statute extends the time for filing the petition beyond the two years limitation for the ordinary writ indicates that the Act was intended to give relief in a proper case although it had been reviewed by the Supreme or Appellate court. The extended time for filing the motion would allow for the disclosure of grounds for the writ not known by the court at the time of the trial and which do not appear in the record. No cases in point holding to the contrary are cited.

In The People v. Barnett, 347 Ill. 127, is found a statement of the facts in the original criminal case. Maurice A. Barnett, Max Krakow, Laura E. Price, Joseph Baum and Ben Levin were indicted in the Criminal court of Cook county for conspiracy to obtain a large sum of money from the Royal Exchange Assurance, a corporation of London, England, by insuring certain jewelry and fur coats in the possession of Laura E. Price against loss and falsely pretending that they were taken from her in a robbery; Barnett and Krakow obtained a severance from the other defendants and were tried and found guilty. Baum and Levin testified on behalf of The People, implicating Barnett in the conspiracy and detailing the manner in which ^{the} pretended

robbery of Mrs. Price was carried out. The Insurance company paid to the conspirators the amount of the policy, which was divided among them, but Baum and Levin becoming dissatisfied, turned State's evidence.

The present petition is based upon two grounds: (1) That Baum and Levin have repudiated their testimony given upon the trial and by affidavit admitted that it was false; and (2) That the assistant prosecuting attorney secured a conviction by falsely representing to the jury that Baum and Levin had not ^{been} promised immunity from prosecution in consideration of their giving testimony for The People. As to the first point, it has been settled that perjury alone is not sufficient grounds for granting a new trial, and certainly is not ground for the issuance of the writ under section 89 of the Practice act. People v. Drysch, 311 Ill. 342. This is conceded by counsel for the defendant. In this connection it should be noted that on the hearing on this motion, Baum admitted that he made an affidavit tending to repudiate his testimony given upon the trial, but gave as an explanation that it was represented to him that his affidavit to this effect would be used only in the effort to obtain a pardon for Barnett; that when he learned it was to be used in connection with the instant motion he sought to obtain possession of the affidavit, without success. He testified upon the instant hearing that the affidavits he and Levin made were not true; that they were made because they felt sorry for Barnett; the witness repeatedly asserted that the testimony given upon the original trial was true except in one detail, not important.

The fraud which defendant asserts was perpetrated upon the court and jury, thus preventing a fair trial, consisted for the most part of language used by assistant prosecutor Mueller in his argument to the jury. In his argument he implied that Baum and

recovery of the price was carried out. The interest on company paid
to the corporation for amount of the policy, which was divided
among them, the same and Levin becoming interested, caused
Hester's evidence.

The present position is based upon two grounds: (1) That
Hester and Levin have represented their testimony given upon the trial
and by affidavit admitted that it was false; and (2) That the
assistant prosecuting attorney secured a conviction by falsely
testifying in the jury that Hester and Levin had not
intentionally from prosecution in consideration of their giving testi-
mony for the people. As to the first point, it has been settled
that every one is not a competent witness for granting a new
trial, and certainly is not ground for the issuance of the writ
under section 83 of the practice act. People v. Winick, 111 Ill.
342. This is supported by counsel for the defendant. In this con-
nection it should be noted that on the hearing on this motion, Hester
admitted that he made an affidavit tending to impeach his testi-
mony given upon the trial, but gave an explanation that it was
retracted so that his affidavit to this effect would be used
only in the effort to obtain a pardon for Hester; that when he
learned it was to be used in connection with the instant motion he
sought to obtain possession of the affidavit, without success. He
testified upon the instant hearing that the affidavits he and Levin
made were not true; that they were made because they felt sorry for
Hester; that Hester eventually asserted that the testimony given
upon the original trial was true except in one detail, not im-
portant.

The trial judge defendant Hester was permitted upon the
court and jury, after reviewing a fair trial, concluded for the
most part of the case and by assistant prosecuting attorney in his
argument to the jury. In his argument he implied that Hester and

Levin had not been promised "an immunity bath." He said:

How could they get an immunity bath without the sanction of the Criminal Court Judge of Cook County, we must bring the case up before the Judge, the Judge must be part and parcel of the immunity bath. What right has Mr. Binkley, what right have I to say to any hoodlum or criminal, you come in here and I will put you back on the street, where you belong, without taking into consideration that the Judge might have something to say about it? Consider that carefully, men ***"

Upon the original trial Baum was cross-examined sharply by counsel for defendant as to what consideration he had been promised for his testimony; he said in substance that his lawyer, Mr. Golan, had said "he would have all the consideration possible *** he said he would take care of it." There was considerable evidence touching the question whether Baum and Levin had been promised immunity, although there is nothing definite. However, it is a reasonable interpretation of this testimony that while the prosecuting attorney may not in so many words have promised Baum and Levin or their attorney that they would not be prosecuted, yet by more or less equivocal language their attorney was given to understand that his clients would not be prosecuted should they testify on behalf of The People.

Upon the hearing it appeared that after the affirmance of the judgment by the Supreme court orders of nolle prosequi were entered in the case against Baum and Levin.

Was the argument to the jury intimating that no immunity had been promised, although immunity had been promised, a fraud such as would justify the issuance of the writ? In The People v. Crooks, 326 Ill. 266, it was said that the errors of fact which may be availed of under the motion made in pursuance of section 89 of our Practice act include duress, fraud and excusable mistake; that the fraud must be such on the part of the opposing party or his counsel that prevents one from making his defense, citing Chapman v. North American Life Ins. Co., 292 Ill. 179; Tosetti Brewing Co.

v. Kochler, 200 Ill. 369; that the fraud must work to the deprivation of a defense which the defendant could have used at his trial and which, if the court had known, would have prevented a conviction; that in such proceedings in a criminal case the burden is upon the petitioner to prove his allegations by the preponderance of the evidence.

We do not find any case holding that the promise of immunity to a co-defendant in a criminal case, and argument tending to lead the jury to believe that immunity has not been promised is such a fraud as, if known, would have prevented a conviction and sufficient ground for a motion under the statute. The statement to the jury could hardly have misled the court, as it is a matter of common knowledge that immunity from prosecution is frequently promised, directly or indirectly, to defendants in criminal cases. We are also unable to see how any misrepresentation as to the promise of immunity prevented the defendant from presenting his defense. The promise of immunity would only go to the weight of the testimony of Baum and Levin, and there was testimony of other witnesses and circumstances tending to corroborate their testimony.

It also should be noted that by persistent cross-examination upon the trial counsel for defendant elicited from Baum and Levin that they were giving their testimony with the expectation and hope that they would not be prosecuted. It was rather a violent presumption to think that the jury or the court was misled in this respect.

The defendant was bound to prove by a preponderance of the evidence, not only that the court and jury were in fact deceived by the assistant State's attorney, but also that this was such a fraud as prevented the defendant from presenting his defense. The evidence upon the hearing of the motion fell far short of this.

Other points are made, such as the failure to includeⁱⁿ the bill of exceptions the evidence taken upon the original trial,

although this was introduced in evidence upon the hearing of the motion, but we have preferred to consider the case as presented by respective counsel without approving of the way the record is presented.

For the reasons indicated the order of the Criminal court denying the prayer of the petition was proper, and it is affirmed.

AFFIRMED.

Katchett, P. J., and O'Connor, J., concur.

which this was introduced in evidence upon the hearing of the motion, but we have preferred to consider the case as presented by the respective counsel without removing of the day, the record is presented.

For the reasons indicated the order of the original court denying the prayer of the petition was proper, and it is affirmed.

WATSON, J., and O'CONNOR, J., concur.

36263

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR NELSON, Auditor of
Public Accounts,

Complainant,

v.

GARFIELD STATE BANK, a corporation,
Defendant.

APPEAL OF MARIA DI NUNZIO,
(Petitioner),

Appellant,

v.

JOHN J. DRISCOLL and ARTHUR JACOBS,
(Petitioners),

Appellees.

37 A
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

271 I.A. 599¹

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a chancery proceeding commenced in the Circuit court, by the Auditor of Public Accounts of the State of Illinois, a receiver was appointed to bring about the dissolution of the Garfield State Bank. Intervening petitions were filed by John J. Driscoll and Arthur Jacobs asserting preferred claims against a certain trust fund in the hands of the receiver, to the amounts of \$3330 and \$125, respectively. Maria Di Nunzio also filed an intervening petition asserting her exclusive right to a preferred claim to this trust fund which she claimed amounted to \$16,000. A decree was entered by the court allowing Driscoll a preferred claim of \$3330 and Jacobs \$125 against this trust fund and directing the receiver to pay the claims. The decree also provided that the payments to Driscoll and Jacobs should be without prejudice to appellant's claim to the balance of the alleged trust fund, and ordered that

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

In a recently proceeding commenced in the Circuit Court,
by the mother of said deceased, of the State of Illinois, a re-
viewer was appointed to bring about the dissolution of the partnership
State Bank. The various questions were filed by John L. Trice,
and after several hearings presented claims against a certain
trust fund in the hands of the receiver, to the amount of \$8300.
and also, respectively. Each of them also filed an intervening
petition asserting her exclusive right to a preferred claim to this
trust fund which she claimed amounted to \$16,000. A decree was
entered by the court allowing Trice a preference claim of \$5500
and Judge Cook granted this first fund and directed the receiver
to pay the claims. The decree also provided that no payment be
made to the claimants until the amount of the fund, and ordered that

the claim of Maria Di Nunzio to any balance then remaining, and the hearing on same, be continued generally and until the further order of the court.

Since this appeal was perfected the death of appellant, Maria Di Nunzio, has been suggested, and leave was granted June 20, 1933, by this court, to substitute Ottavio Di Nunzio, the administrator of her estate, as appellant in lieu of Maria Di Nunzio, deceased.

The sworn petition of Driscoll filed September 25, 1931, alleged that he is a building contractor; that about May 18, 1931, Maria Di Nunzio and Joseph Di Nunzio, her husband, were owners of certain real estate in the city of Chicago, and that the Garfield State Bank was the legal holder and owner of all unpaid first mortgage bonds against this real estate, secured by a trust deed executed May 12, 1925, by the then owner Michael J. Duffy, and his wife, to the Garfield Park State Savings Bank (predecessor of Garfield State Bank); that an agreement was made for the sale of the south 9.21 feet of said property to the Chicago Rapid Transit Co., and it became necessary to cut off from the rear of the building on said property enough of the building to clear said 9.21 feet; that said Transit Co. delivered to the Garfield State Bank the purchase price for said 9.21 feet; that to remodel the premises the bank as trustee separated and agreed to hold in trust \$3330 to pay for all alterations, labor and material necessary to do all work shown on the plans and specifications for alterations to be made on said building; that May 18, 1931, he made a written contract with the bank as trustee for the owners of said lots to furnish all labor and material necessary for such work for \$3330; that payment of \$1000 by said bank as trustee to him was acknowledged in said contract and was to be paid by said trustee, but not directly to him as he had directed the trustee to apply said \$1000 in payment of bonds on buildings owned by him; that he does not know whether such application has been made, and if it has not been then no payment out of said \$3330 has been made; that he completed the work July 20, 1931, and said \$3330 is due him; that a bill was filed

The state of Texas is a sovereign state and its laws are supreme within its borders. The federal government has no authority to interfere with the laws of the state of Texas.

It is the policy of the state of Texas to protect the rights of its citizens and to maintain the peace and order of the state. The state of Texas is a sovereign state and its laws are supreme within its borders.

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34
August 19, 1931, in this cause for the dissolution of said bank and John K. Sullivan was appointed receiver of the bank and has possession of all of its assets and trust funds; that said \$3330 was held by the bank as trustee in a separate account and was separate and distinct from the funds used in its general business and not as a deposit; and prayed an order directing said receiver to turn over said \$3330.

September 30, 1931, a sworn petition was filed by Arthur Jacobs containing the same allegations as the Driscoll petition except that Jacobs alleged that he was an architect; that he was employed by the bank, as trustee for the owner Maria Di Nunzio, to prepare plans and specifications for the alterations and to superintend same, for which he was to be paid \$200, of which amount \$75 has been paid him by the bank, leaving a balance due and unpaid of \$125, and prayed for an order directing the receiver to turn over \$125 to him.

The receiver filed an answer October 7, 1931, to the intervening petition of Driscoll in which he averred that he was appointed receiver of the Garfield State Bank August 20, 1931. The answer admitted all of the allegations of Driscoll's petition except that it alleged that the \$3330 is carried in an account payable, and that \$1000 of that amount is being held for the purpose of taking up mortgage bonds against certain property owned by Driscoll as alleged in his petition, but that the application of that sum for that purpose had not as yet been made and that Driscoll is entitled to a preferred claim only to the extent of \$2330. The answer of the receiver to Jacobs' petition admitted all of its allegations except that it alleged that the money, claimed by Jacobs to be held by the bank in a trust fund for the payment for alterations to the building in question, was held in an account payable in the name of Maria Di Nunzio to be used to

about the fall, in this case the the situation of the bank
and John A. Williams was appointed receiver of the bank and was
possessed of all of the assets and debts of the bank.

was held by the bank at the time in a separate account and was
expended and withdrawn from the bank and in the general business
and was not a deposit and was not a deposit in the receiver's
as from the bank.

October 10, 1911, a motion picture was filed by William

Jacob Williams and was filed in the receiver's office
except that Jacob alleged that he was an architect; that he was
employed by the bank, he stated for the owner of the bank, to
prepare plans and specifications for the alterations and to examine

them same, for which he was to be paid \$100,000 of which amount \$75
has been paid him by the bank, leaving a balance due and unpaid of
\$25,000, and he was not an architect, the receiver has been over

\$100,000.

The receiver filed an answer October 9, 1911, to the

interpleader petition of Williams in which he stated that in the

answer submitted all of the allegations of Williams's petition

except that is alleged that the \$100,000 is paid in an account

payable, and that Jacob of the bank is being paid for the

purpose of taking up mortgage money against certain property owned

by Williams as alleged in his petition, and that the application

of that sum for that purpose has not yet been made and that

Williams is entitled to a judgment against the bank of

\$25,000. The answer of the receiver to Jacob's petition admitted

all of the allegations except that it alleged that the money,

claimed by Jacob, to be paid by the bank in a fund for the

payment for alterations to the building in question, was held in

an account payable in the name of Jacob of the bank to be paid to

remodel the said building and included the \$200 to be paid to Jacobs for his services as architect.

Maria Di Munsie filed an intervening petition November 3, 1931, in which she alleged that May 13, 1931, she owned the real estate in question, except the south 9.21 feet, which had been conveyed by her to the Chicago Rapid Transit Co., which company delivered to her in payment its check for \$17,000 payable to her order upon some bank unknown to her; that when she acquired title to this property it was encumbered by a trust deed executed May 12, 1925, to secure the payment of bonds in the amount of \$35,000 due June 10, 1930, and that she never assumed that incumbrance, merely purchasing the equity in the property; that May 13, 1931, Delbert A. Clithero, who was a partner in the law firm of Campbell, Clithero & Fischer, as well as president of the Garfield State Bank, informed her that if she would acquire \$11,000 of the past due and unpaid bonds outstanding against her property a new loan of \$24,000 could be obtained by her upon her surrender of \$11,000 worth of bonds so purchased and payment by her of the interest on the bonds not acquired; and desiring to accomplish this result she deposited with Campbell, Clithero & Fischer the \$17,000 check which she received from the Chicago Rapid Transit Co., to be used by them to purchase for her \$11,000 of the first mortgage bonds; that \$1000 was to be paid to one David K. Cochrane for legal services theretofore rendered (this amount was paid to attorney Cochrane); \$3330 was to be paid to John J. Driscoll for work done in altering and repairing the premises owned by her; \$974.50 was to be used to pay general taxes for the year 1929; the balance was to be paid to her or as she might direct and that the bank, through Clithero, had notice and knowledge of this arrangement; that without her consent Clithero and his partners and the bank caused this check to be delivered to the bank and

[illegible]

collected by it and converted to its own use; that the 1929 taxes were not paid and that nothing was paid to Driscoll as authorized and directed by her; that although the bank and its receiver claim that the bank acquired \$11,000 worth of the bonds in her behalf and cancelled them, yet neither these bonds nor any part of them were ever delivered to her and the bank and the receiver wrongfully claim that the remaining \$5000 of the proceeds of the \$17,000 check has been applied in partial payment of the remaining bonds or of other claims, but she alleges that no right exists or has existed to make such application; that the check constituted a trust fund in the hands of Clithero and his partners of which she was and is the sole beneficiary; that she has demanded that Clithero and his partners return to her the \$16,000 remainder of the trust, but they refused to do so or account for same; that the bank took this check and its proceeds impressed with the trust and she avers that she has a preferred claim against the bank and the receiver for the \$16,000 remainder of the trust fund, but the receiver refused to recognize it as such or pay any part of the fund to her; and she asked leave to make the receiver a defendant, along with Clithero and his partners, in her bill of complaint to be filed in the Circuit court seeking to impress this trust on this money where ever it may be found and for an accounting of same; she also prayed that her claim as set forth be considered a preferred claim against the bank and its receiver.

In his answer to the petition of Maria Di Nunzio the receiver denies knowledge of any negotiations or agreements between her and Delbert A. Clithero or the firm of Campbell, Clithero & Fischer in regard to the \$17,000 check or its proceeds, and he also denies that he is holding \$16,000 in trust for her or that she is entitled to a preferred claim for that amount or any amount. He states in his answer that the proceeds of the check for \$17,000

collected by it and converted to its own use; that the 11,000 francs were not paid and that nothing was paid to anybody as a dividend and directed by him; that although the bank and the receiver claim that the bank deposited 11,000 francs in the bank of Paris and universal bank, yet neither bank could say part of them were ever delivered to him and the bank and the receiver respectively claim that the remaining 11,000 of the proceeds of the 117,000 francs has been applied in partial payment of the remaining bonds on of other claims, but who alleges that no right exists on the claims to make such application; that the 11,000 francs were found in the hands of Liffredo and his partners at which time and in the sole possession of the bank and the receiver and his partners began to pay the 11,000 francs of the time, but they refused to do so on account of the fact that the bank took this check and the proceeds impressed with the bank and the receiver that she has a partial claim against the bank and the receiver for the 11,000 francs of the bank's funds, but the receiver refused to recognize it as such or pay any part of the fund to her; and she asked leave to make the receiver a defendant, along with Liffredo and his partners, in her bill of exchange to be filed in the district court, seeking to require that fund on this money there ever is any of fund and for an accounting of same; she also prayed that the claim be set aside be considered a payment claim against the bank and the receiver.

It was agreed to the petition of Liffredo to the receiver Liffredo through all negotiations or agreements between her and Robert A. Liffredo on the firm of Campbell, Liffredo & Liffredo is agreed to the 117,000 francs of the proceeds, and he also claims that he is holding 11,000 in trust for her or for her and is entitled to a preferred claim for that amount in any liquidation of the fund.

were credited to an account payable, carried by the Garfield State Bank in the name of Maria Di Nunzio, and that the records available show that the account was charged on May 14, 1931, with \$1000 paid to Clithero for attorney Cochrane for legal service; that May 16, 1931, it was charged with \$11,000 in payment for that amount of first mortgage bonds outstanding against her property, thus reducing the first mortgage indebtedness to \$24,000; that on May 21, 1931, it was charged with \$75 paid to Jacobs as part payment of his fee for services for drawing plans and superintending the altering of the building in question; that a balance of \$4,925 is being held by the Garfield State Bank, as trustee under a certain agreement between the bank and Maria Di Nunzio, for the purpose of securing the payment of bills for material and labor in altering the building and that Driscoll and Jacobs have filed claims for the amount due them, which they charge should be preferred out of this trust.

August 12, 1932, this cause came on for hearing on the separate petitions of Driscoll and Jacobs, the separate answers of the receiver thereto, the petition of Maria Di Nunzio and the answer of the receiver to her petition, and the petitioners Driscoll and Jacobs moved the court that the receiver be directed to pay to them the money demanded in their respective petitions; whereupon the court orally directed, without entering any formal order of reference, that the parties go before one Julius H. Miner, a master in chancery of the Circuit court, in an adjoining court room so he might hear the evidence and contentions of the parties and make his recommendations to the court as to the order to be entered.

It appeared that the master considered the petitions and answers, heard the evidence and read the amended bill of complaint in another cause pending in the Circuit court against the receiver, and others, in which appellant was the complainant, which bill

were credited to an account payable, carried by the Central State Bank in the name of Maria M. Kunkle, and that the resources available there and the account was charged on May 14, 1931, with \$1000 paid to attorney for attorney's fee for legal services; that May 16, 1931, it was charged with \$11,000 in payment for that amount of first mortgage bonds outstanding against her property, thus totaling the first mortgage indebtedness to \$12,000; that on May 21, 1931, it was charged with \$75 paid to Jacob as part payment of his fee for services for creating plans and superintending the altering of the building in question; that a balance of \$4,025 is being held by the Central State Bank, as trustee under a certain agreement between the bank and Maria M. Kunkle, for the purpose of securing the payment of bills for material and labor in altering the building and that Kunkle and Jacob have filed claims for the amount due them, which they charge should be preferred out of this fund.

Largely in 1932, this fund came on for hearing on the separate petitions of Kunkle and Jacob, the separate answers of the receiver thereto, the petition of Maria M. Kunkle and the answer of the receiver to her petition, and the petitioners themselves and Jacob moved the court that the receiver be directed to pay to them the money demanded in their respective petitions; whereupon the court orally directed, without entering any formal order or references, that the receiver go before one Julius H. Elmer, a master in chancery of the district court, in an adjoining court room so he might hear the evidence and contentions of the parties and make his recommendations to the court as to the order to be entered.

It appeared that the master considered the petition and answers, heard the evidence and read the amended bill of complaint in another court room in the district court against the receiver, and others, in which applicant was the complainant, which bill

contained substantially the same allegations as the petition filed by her in this proceeding and by which she sought to have the court declare that the \$16,000 involved was impressed with a trust in her favor and that she should be allowed a preferred claim to that amount to the exclusion of all other claimants; that the master indorsed on the decree, which was subsequently entered by the court, the words, "Approved the _____ day of _____, 193____, J. H. Miner, Master in Chancery, Circuit Court," and directed the parties to appear before the court with his recommendation that the decree approved by him be entered by the court and upon report of the recommendation and findings of the master the decree was entered, the material portions of which are as follows:

"On motion of Samuel Schmetterer, solicitor for John J. Driscoll and Arthur Jacobs, intervening petitioners, and on their petitions for reclamation now on file in the above entitled cause, and on the answers of John E. Sullivan, receiver of the Garfield State Bank, to said petitions, and on notice of motion of hearing to Crowe, Gorman & Savage, solicitors for said receiver, and to A. W. and Edward M. S. Martin, solicitors for Maria Di Nunzio and Joseph Di Nunzio, complainants in Circuit Court case No. B 231910;

"And the Court, having read said petitions of John J. Driscoll and Arthur Jacobs, having read the answers of John E. Sullivan, receiver of the Garfield State Bank, to said petitions, having heard the arguments of counsel, having read the Bill of Complaint as amended in Circuit Court case No. B 231910, and the answers of John J. Driscoll and Arthur Jacobs to the Bill of Complaint as amended, having heard the evidence in support of said petitions of John J. Driscoll and Arthur Jacobs, and their answers in Circuit Court case No. B 231910 and the Bill of Complaint as amended in that case; and the court, being now fully advised in the premises, after a full hearing on the claims of John J. Driscoll and Arthur Jacobs;

"BOTH DIRECT John E. Sullivan, as receiver of the Garfield State Bank in Circuit Court case No. B 225394 in the above entitled cause to pay unto John J. Driscoll the sum of Thirty Three Hundred Thirty Dollars (\$3330.00) and to Arthur Jacobs the sum of One Hundred Twenty five (\$125.00), and to accept from them, as a condition precedent to said payment, full and complete waivers of lien for said sums for the work completed by them, as set forth in their petitions for reclamation of said moneys.

"It is further ordered that the payments of said moneys, to-wit, the sum of Thirty Three Hundred Thirty Dollars (\$3330.00) to John J. Driscoll, and the sum of One Hundred Twenty Five (\$125.00) to Arthur Jacobs, shall be without prejudice to any rights of the complainant in Circuit Court case No. B 231910 to claim any further balance for moneys remaining or now held by John E. Sullivan as receiver of the Garfield State Bank after deducting the above amounts, Thirty Three Hundred Thirty Dollars (\$3330.00) and One Hundred Twenty Five (\$125.00) respectively."

The appellant contends that no order of reference to the master in chancery for the purpose of hearing evidence or for any other purpose was entered by the court in this case; that no report of a master was made and that the court erroneously entered the decree without hearing evidence, but simply on the approval of the draft of the decree by the master after he had heard the evidence.

The petitioners Driscoll and Jacobs contend that they were entitled to a decree on the pleadings alone without the introduction of any evidence, inasmuch as the petition of Maria Di Nunzio and the several answers of the receiver either admitted the allegations of their petitions or failed to deny them. At the time the motion was made by petitioners for the entry of the decree upon the pleadings, the record does not disclose at whose instance the court directed the taking of testimony and the hearing of evidence by the master, but it does disclose that when the parties with their solicitors appeared before the master without objection to the action of the court in directing them to so appear, and without objection to the court or to the master as to the hearing of testimony by the master, that it was appellant who proceeded to present evidence before the master. The record disclosed no objection offered to the master nor to the trial court as to the method, manner or nature of the report of the master or to his failure to report. The sole objection of appellant disclosed by a careful examination of the record is a general objection to the entry of the decree. Assuming that there was irregularity in the reference to the master or in connection with his report or his failure to properly report, the law is settled that a party cannot participate in such a hearing and be heard to complain for the first time in this court. In the case of Freese v. Glen, 248 Ill. 280, 282, the court said:

The complaint contained that no order of reference to the master in chancery for the purpose of hearing evidence or for any other purpose was entered by the court in this case; that no report of a master was made and that the court erroneously entered the decree without hearing evidence, but simply on the approval of the facts of the decree by the master after he had heard the evidence.

The petitioners Wilson and Jacobson contended that they were entitled to a decree on the pleadings alone without the introduction of any evidence, inasmuch as the petition of Maria M. Jacobson and the several answers of the respondent either admitted the allegations of their petition or failed to deny them. At the time the motion was made by petitioners for the entry of the decree upon the pleadings, the record does not disclose at least inasmuch the court directed the taking of testimony and the hearing of evidence by the master, but it does disclose that when the parties with their witnesses appeared before the master without objection to the action of the court in directing them to so appear, and without objection to the court or to the master as to the hearing of testimony by the master, that it was apparent who proceeded to present evidence before the master. The record discloses no objection offered to the master nor to the trial court as to the method, manner or nature of the report of the master or to his failure to report. The sole objection of appellants disclosed by a careful examination of the record is a general objection to the entry of the decree. Assuming that there was irregularity in the reference to the master or in connection with his report or his failure to properly report, and even if it is settled that a party cannot file a petition for such a decree and be heard to complain for the first time in this court. In the case of Ex parte Wilson, 111, 100, 222, the court said:

"If, however, the parties treated the order as a valid order of reference, as they appear to have done, and appeared before the master and participated in the hearing before the master and made no objection as to the order of reference before the master or in the court below, it is too late for them to raise the question that the order of reference was insufficient after the case has reached this court on appeal."

In discussing a similar proposition the court in Hawley v. Simons, 157 Ill. 218, 224, used the following language:

"If there is an appearance and participation in the taking of evidence without an order, parties cannot question the authority of the master to act, but the subsequent entry of an order of reference would amount to nothing."

From the record presented on this appeal it cannot be said with any degree of certainty that the court heard no evidence before entering the decree. It surely cannot be assumed that no evidence was heard by the court in the face of the following recital of the decree, supra:

"Having heard the evidence in support of said petitions of John J. Driscoll and Arthur Jacobs and their answers in Circuit Court case No. B 231916 and the bill of complaint as amended in that case, * * *"

No specific objection was made to any recital or order contained in the decree.

Although some effort was made by appellant's witnesses to contradict the admissions made in her pleadings, in its final analysis the evidence offered was in conformity with those admissions and only tended to add force to them. The evidence offered by appellant was neither disputed nor contradicted and accorded with the theory of the case advanced by Driscoll and Jacobs.

If no evidence had been presented, and if we disregard what was offered, in our opinion the court was justified in entering the decree on the pleadings. Driscoll contends that he furnished material and labor to remodel the building owned by appellant and that she received the benefit of the materials and labor so furnished; that his contract with the Garfield State Bank to do this

work was entered into with her knowledge, consent and approval, and that she specifically authorized and directed the payment to him of \$3330 out of the trust fund created, with this payment to him as one of its specific objects; that no part of this \$3330 has been paid to him, or otherwise applied, and that the court properly entered the decree ordering the receiver to pay him this amount as a preferred claim out of the trust fund in his hands.

The answer of the receiver admits Driscoll's contract with the bank for the alteration of appellant's building for the agreed price of \$3330; that said sum is being carried by the bank in an account payable; that no part of that amount has been paid to Driscoll or otherwise applied; and that Driscoll is entitled to a preferred claim for such amount as the court finds to be due and owing to him.

The petition of appellant filed in this cause avers that the \$17,000 received by her for the sale of a portion of the land upon which the building stood that Driscoll altered for her was placed in trust by her for certain specific objects and purposes, and according to her petition one of the specific purposes of the trust was "\$3330 to be used to pay an indebtedness of your petitioner to John J. Driscoll for work done in remodeling and repairing the building remaining on the portion of said lots 11 and 12, not conveyed by your petitioner as aforesaid." Her petition also avers "that no part of said \$3330 has been paid to said John J. Driscoll." In her bill of complaint in her separate proceeding in the Circuit court she repeats the above admissions made by her in her intervening petition filed in this cause. In the receiver's answer to her petition in this cause we find the following paragraph:

"Further answering, your Receiver states that a balance of Four Thousand Nine Hundred Twenty-five (\$4,925.00)

is being held by the Garfield State Bank, as trustee under a certain agreement, for the purpose of securing payment of bills for material and labor in remodeling the building on the afore-described real estate, and that John J. Driscoll, the contractor, and Arthur Jacobs, architect, have filed claims with your Receiver for the amounts due them for their services, against this account."

In our opinion these admissions without any evidence are conclusive and preclude both the appellant and the receiver from denying Driscoll's right to a preferred claim for \$3330.

Jacobs alleged in his intervening petition that for the purpose of altering appellant's building on the premises in question the Garfield State Bank, as trustee for appellant, caused to be placed in a special and distinct fund, and agreed to hold in trust in a separate and distinct fund, an amount sufficient to cover the cost of completing the remodeling of appellant's building, including \$200, the agreed price to be paid to Jacobs as his fee for preparing plans and specifications and superintending the alteration of the building; that the bank as trustee has paid him \$75 on account and that there is still due under his contract for services rendered on behalf of appellant \$125, for which amount he avers he should be allowed a preferred claim against the receiver.

Neither in her intervening petition filed in this cause, nor in her bill of complaint filed in the separate proceeding in the Circuit court, does appellant deny a single allegation of Jacobs' petition, and it must therefore be concluded that she admits such allegations. The receiver's answer to Jacobs' petition contains the following paragraph:

"Further answering, your receiver states that a certain sum of money was carried in an Accounts Payable account in said Garfield State Bank under the name of 'Maria Di Nunzio' which fund was to be used for remodeling the premises as alleged in said petition; that said fund included the sum of Two Hundred (\$200.00) Dollars to be paid to the petitioner for his services as architect in remodeling the said building, and that according to the records of said Bank the sum of Seventy-five (\$75.00) Dollars was paid to the petitioner, and there is a balance due him of One Hundred Twenty-five (\$125.00) Dollars, as alleged."

Jacobs' claim to a preferred allowance not having been denied by appellant, and being substantially admitted by the receiver, she is precluded from refuting his right to such claim for the \$125 still due.

Appellant contends that Driscoll and Jacobs should be compelled to go to another forum to seek their relief, either through mechanics' lien proceedings or to obtain a judgment against her in a court of law for the amounts admittedly due them. We cannot agree with her and, in our opinion, they are equitably entitled to the relief ordered by the decree out of the specific trust fund created by appellant, one object of which was the payment of the cost of altering her building. Further contentions have been urged, but in view of the fact that they do not affect the equities of this cause, we deem it unnecessary to discuss them.

For the reasons stated herein the decree of the Circuit court is affirmed.

AFFIRMED.

Gridley and Seanlan, JJ., concur.

...claim to a property, which was not having
been denied by appellant, and which was actually admitted by
the respondent, who is precluded from raising his right as such
claim for the first time.

Appellant contends that his claim and remedy should be
granted to him as a matter of course, and that his right, either
therein or otherwise, is a matter of course, and that a judgment
should not be made in a case of law for the respondent, especially the
respondent, who is not with him, and, in our opinion, they are
entirely entitled to the relief ordered by the court and of
the specific relief ordered by appellant, and object of
which was the payment of the cost of affixing his building.
Further consideration has been given, but in view of the fact
that they do not object to the award of this award, as there
is no objection to it being made.

For the reasons stated herein the award of the

award is affirmed.

W. H. HARRIS.

City and County, 11th Avenue.

36291

SAM FREEMARK,
Appellee,

v.

IRVING EISENMAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHIC GO.

271 I.A. 599²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Sam Freemark, filed a fourth class tort action against defendant, Irving Eisenman, in the Municipal court, claiming damages for the alleged conversion of two \$500 real estate bonds. The case was tried before the court without a jury and judgment for \$700 was entered on the finding of the court that defendant was guilty. This appeal followed.

Plaintiff in his amended statement of claim alleged that "on the 18th day of September, A. D. 1931, he was the registered owner of two real estate bonds described as #24 and #45 Ridgeway Block Bonds, the total par value of the bonds being one thousand dollars, and for which the plaintiff paid one thousand dollars; that on the 18th day of September, A. D. 1931, one L. Aaron, a stranger to this suit, approached the plaintiff and represented to him that he was ready and willing to purchase the bonds for cash, and that if the plaintiff surrendered the bonds to Aaron the cash value of the bonds in the sum of one thousand dollars would be immediately forthcoming; that the plaintiff, relying upon the statements made by Aaron, surrendered the bonds to him; that the statements were made with the fraudulent and willful intention of inducing the plaintiff to surrender the bonds and that the plaintiff, by reason of the statements which had been made, surrendered the bonds without receiving any consideration whatsoever from

THE PEOPLE OF THE DISTRICT OF COLUMBIA
v.
JAMES M. HARRIS
Appellant.

APPEAL FROM JUDICIAL DECISION

COURT OF THIS DISTRICT

25201 I.A. 533

THE COURT OF THIS DISTRICT, in its decision on the appeal.

Plaintiff, James M. Harris, filed a fourth class tort

action against defendant, Irving Wineman, in the Municipal

court, claiming damages for the alleged conversion of two \$200

gold bonds. The case was tried before the court without

a jury and judgment for \$200 was entered on the finding of the

court that defendant was guilty. This appeal followed.

Plaintiff in his amended statement of claim alleged

that "on the 18th day of September, 1931, he was the regis-

tered owner of two gold bonds described as \$25 and \$25

Nightway Gold Bonds, the total par value of the bonds being one

thousand dollars, and for which the plaintiff paid one thousand

dollars; that on the 18th day of September, 1931, one J. M. Harris,

a stranger to this suit, approached the plaintiff and requested

to him that he was ready and willing to purchase the bonds for

cash, and that if the plaintiff surrendered the bonds to him the

cash value of the bonds in the sum of one thousand dollars would

be immediately forthcoming; that the plaintiff, relying upon the

statements made by Harris, surrendered the bonds to him; that the

statements were made with the fraudulent and willful intention of

inducing the plaintiff to surrender the bonds and that the plain-

tiff, by reason of the statements which had been made, surrendered

the bonds without receiving any consideration whatsoever from

Aaron, who at the time of his representations never intended to pay any consideration whatsoever to plaintiff, to the damage of the plaintiff in the sum of one thousand dollars. Plaintiff further alleged that the bonds so fraudulently secured by Aaron were later discovered in the possession of the defendant who had received the said bonds after they had become due and payable, to-wit, June 19th, A. D. 1931, which date precedes the date of the conversion of the said bonds, to-wit, September 18th, A. D. 1931; and that he has repeatedly requested the said defendant to return the bonds to the plaintiff but the defendant has refused to do so, to the damage of the plaintiff in the sum of nine hundred and ninety dollars."

Defendant in his affidavit of merits denied that the bonds were registered and owned by plaintiff; that he had any knowledge that a fraud had been perpetrated on plaintiff or that he willfully converted the bonds; alleged that he was the bona fide purchaser for value of the bonds; that plaintiff's loss was the result of plaintiff's negligence and that his claim to ownership of the bonds is superior to plaintiff's.

Defendant contends that Aaron approached him several times as an agent of H. W. Hydick & Co. in an effort to sell him the bonds in question and that he finally purchased the bonds for \$540 and they were delivered to him by Aaron, and inasmuch as the bonds were not registered, were payable to bearer, were in Aaron's possession and were purchased by defendant in good faith and without knowledge of any defect in Aaron's title, that the right of defendant in and to the bonds is superior to the alleged right of plaintiff.

The undisputed facts are that plaintiff was the owner of two \$500 unregistered real estate bonds due June 19, 1931, secured by a trust deed on property belonging to Hyman

to do so, as the average of the plaintiff in the sum of nine hundred
return the same to the plaintiff but the defendant has refused
1931; and the defendant has refused to pay the same to the plaintiff
the conversion of the said bonds, to-wit, September 1931, and
to-wit, June 1931, and to-wit, which is between the date of
received the said bonds after they had become due and payable,
were later discovered in the possession of the defendant and had
thereafter alleged that the bonds so transferred, received by them
of the plaintiff in the sum of one hundred dollars, plaintiff
pay the consideration of twenty to plaintiff, to the amount of
Aachen, he at the time of his receipt of the said bonds intended to

[illegible]

1. The above information was obtained from a confidential source who has provided reliable information in the past.

THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535

Eisenman, father of the defendant; that he had purchased the bonds from the Noel State Bank and that they had not been paid at their maturity and foreclosure proceedings had been instituted; that September 18, 1931, plaintiff received a letter on the stationery of H. W. Nydick & Co., an investment security concern, written by Aaron requesting an appointment with plaintiff regarding the bonds; that plaintiff went to Aaron's office and discussed the purchase and sale of the bonds with him; that plaintiff turned the bonds over to Aaron who then proposed to give plaintiff as consideration for his bonds a life insurance policy which plaintiff refused to accept; that on plaintiff's demand the bonds were returned to him and the original negotiations were terminated; that subsequently Aaron resumed negotiations with plaintiff for the purchase of the bonds; that he asked plaintiff if he still had the bonds and said that he was the agent of Hyman Eisenman, the owner of the building against which the bonds were issued, and that Hyman Eisenman would purchase the bonds; that plaintiff delivered the bonds to Aaron November 12, 1931, and that Aaron gave plaintiff in payment what he stated to plaintiff was a cashier's check for \$1,000; that this instrument was what purported to be a credit voucher for \$1,000, payable to the order of Sam or Pearl Freemark, on a printed form of the Chicago National Mortgage Service and bearing the purported signature "John Trotter;" that this document resembled a check and was understood to be such by the defendant but when presented for payment plaintiff discovered that it was counterfeit and worthless and he was unable to cash it; that plaintiff then reported the matter to the state's attorney and after a brief period was advised by the state's attorney's office that defendant had the two bonds; and that Aaron, who was not a witness at the hearing, could not be located or apprehended on a warrant which had been issued for his arrest.

[illegible]

Defendant testified, without offering any reasonable or plausible explanation as to why Aaron sought him out as a possible purchaser of the bonds, that Aaron came to him on several occasions with an offer to sell him the bonds, first offering them for \$1,000 and on the final visit September 19, 1931, for \$750 and that they finally agreed on a price of \$540, which amount he paid to Aaron, who delivered the bonds to him; that he recognized Aaron as having attended high school with him; that sometime later he received a telephone call from the Nydick office advising him that the state's attorney was looking for Aaron and that defendant, after asking and being told why the state's attorney was looking for Aaron, said "There is nothing to that, I will go over to the state's attorney's office myself." Defendant testified further that he went to the state's attorney's office and explained his part in the transaction and that his reason for purchasing the bonds was to diminish the amount of any deficiency judgment which might be rendered against his father in connection with the foreclosure proceedings. There was no denial that plaintiff had demanded from defendant the return of the bonds, but defendant refused to return same, asserting that his right to them was paramount to plaintiff's.

Defendant urges that the statement of claim does not state a cause of action and that the trial court erred in denying defendant's motion to strike it. It has been repeatedly held that it is sufficient to file in cases of this kind only such a statement of claim as will reasonably inform defendant of the nature of the case. In Sher v. Robinson, 298 Ill. 181, 183, the court held:

"Section 40 of the Municipal Court act, above quoted, clearly shows that the legislature intended that in an action of the fourth class in tort, brought in the Municipal court of Chicago to recover damages, it is not necessary that the plaintiff's statement of claim should allege all the facts necessary to be proved on the trial but that it is sufficient if the statement reasonably informed the defendant of the nature of the case he is called upon to defend, and the other provisions of said act which bear upon this point are in accord with the provisions of section 40."

Defendant contends that as an innocent purchaser of the bonds for value without notice of the fraud of Aaron he cannot be charged with any defect in Aaron's title.

In order to reach a correct conclusion on the defendant's claimed right to these bonds, it is necessary to consider certain sections of the Negotiable Instruments Act. Section 55, Cahill's Rev. St., ch. 98, par. 75, provides:

"The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The evidence is undisputed that Aaron perpetrated a fraud upon the unwary plaintiff, who was a houseman at the Alexander Hotel, when he secured the possession of the bonds from him in exchange for a worthless piece of paper, which he deceived plaintiff into believing was a cashier's check, and it is also undisputed that his title to the bonds was defective within the meaning of the Act.

Section 59, Cahill's Rev. St., ch. 98, par. 79, provides:

"Every holder is deemed prima facie to be a holder in due course; but when it (is) shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course * * *."

Aaron's title to the bonds was shown unquestionably to have been defective, and under this section of the Act the burden was upon the defendant holder of the bonds who derived his title from and through Aaron to prove that he acquired his title as a holder in due course. In construing this section of the Negotiable Instrument Act in Bell v. McDonald, 308 Ill. 329, the court said, on pages, 334, 335:

"The appellant contends that the court erred in imposing upon him the burden of proving that he acquired the title to the notes as a holder in due course, as required by section 59 of the Negotiable Instrument law when it is shown that the title of any person who has negotiated the instrument is defective. Section 55 of that law declares that 'the title of a person who negotiates an

...the ... of the ...
...without notice of the ... of ... he cannot be
...in ... in ...

...in order to reach a correct conclusion on the ...
...claim right to these bonds, it is necessary to consider certain
...of the ...
...Rev. ... ch. 22, par. 73, provides:

"The title of a person who negotiates an instrument is
defective within the meaning of this ... when he obtains the
instrument by any ... by fraud, duress, or force
and fear, or other unlawful means, or for an illegal consideration
or when he negotiates it in breach of faith, or under such circum-
stances as amount to a fraud."

...the evidence is undisputed that ...
upon the ...
when he ... the possession of the bonds from him in exchange for
a ... piece of paper, which he delivered ... into ...
was a ... check, and it is also undisputed that his title to
the bonds was defective within the meaning of the act.

Section 22, ... Rev. ... ch. 22, par. 73, provides:
"Every holder is deemed ... to be a holder in due
course; but when it is shown that the title of any person who has
negotiated the instrument is defective, the burden is on the holder
to prove that he or some person under whom he claims acquired the
title as a holder in due course."

...title to the bonds was shown ...
have been defective, and under this section of the act the burden
was upon the ... holder of the bonds who ... his title
from and through ... to prove that he acquired his title as a
holder in due course. In construing this section of the
Negotiable Instruments Act in ...
the court said, on page 34, 35:

"The ... contains the ... in ...
upon the ... of ... the title to the
... in the ... as ... by ... of the
... instrument ... it is then that the title is ...
person who has negotiated the instrument is defective. Section 22
of that law ... the title of a person who negotiates an

instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

And on page 338:

"The court was therefore right in instructing the jury that the burden was on the appellant to show that his purchase of the notes was in good faith for value and without notice of any defense to the notes and in refusing to give the appellant's instructions to the contrary."

Section 52, Cahill's Rev. St., ch. 98, par. 72, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The evidence disclosed that these bonds matured June 19, 1931, and that defendant knew at the time of his alleged purchase of them that they had been dishonored and that foreclosure proceedings had been instituted against his father, the owner of the property, because of Hyman Eisenman's default in the payment of these and other bonds.

To constitute a holder in due course under section 52 of the Act one of the essential requirements is that the person in possession of the instrument became the holder of it before it was overdue and without notice that it had been previously dishonored.

It having been shown that defendant purchased the bonds after maturity with full knowledge that they had been dishonored, he is precluded from asserting that he is a holder in due course and he is chargeable with such defects as existed in Aaron's title as provided in section 58, Cahill's Rev. St., ch. 98, par. 78, which reads as follows:

instrument is defective within the meaning of said act when the instrument is in payment, or any other character, by force, fraud, or force and fear, or other unlawful means, or for an illegal consideration or when the negotiable is in payment of debt, or when such character as amount to a "tender."

and on page 301:

"The party who negotiates with the holder in transferring the title that the holder was in the position to give the holder's notice of any defect in the instrument or to give the holder's notice of any defect in the instrument."

Section 32, Cahill's Rev. St., Ch. 98, Part 1, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions:
1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any defect in the instrument or defect in the title of the person negotiating it."

The evidence disclosed that these bonds matured June 10, 1901, and that defendant knew at the time of his alleged purchase of them that they had been dishonored and that notwithstanding proceedings had been instituted against his father, the owner of the property, because of Frank Lineman's default in the payment of these and other bonds.

To constitute a holder in due course under section 32 of the act one of the essential requirements is that the person in possession of the instrument before the holder of it before it was overdue and without notice that it had been previously dishonored. It having been shown that defendant purchased the bonds after maturity with full knowledge that they had been dishonored, he is precluded from asserting that he is a holder in due course and he is therefore with such notice as related in Aaron's title as provided in section 32, Cahill's Rev. St., Ch. 98, Part 1, which reads as follows:

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

It is also urged that the judgment is against the weight of the evidence, but a careful analysis of all the evidence fails to convince that the finding of the court was against the manifest weight of the evidence.

While other points are urged the only serious question presented by this appeal is whether defendant is chargeable with the defects in Aaron's title to the bonds, and having admittedly purchased the bonds after their maturity, the delivery of the bonds to him by Aaron, who secured possession of them through fraudulent means, could not vest a valid title in defendant.

In Pflueger v. Broadway Tr. & Svcs. Bk., 265 Ill. App. 569, 574-5, in discussing the question of the purchase of securities before and after maturity, this court said:

"Two controlling questions arise upon the records: (1) Are the debentures, which are the subject matter of this suit, negotiable? (2) Assuming negotiability, were the same overdue when received by defendant in the transaction in Chicago? If the same were not negotiable or overdue at that time, then defendant would take the same subject to infirmities, not being a holder in due course; but if they were negotiable and not due, even a thief could give good title to one taking for value and in good faith."

In passing upon the same question in Mazer Co., Inc. v. Blauer-Goldstone Co., 259 Ill. App. 305, 310, the following language was used by the court:

"The note maturing April 20, 1927, was received after maturity, and notwithstanding the plaintiff had no knowledge that this note was an accommodation and issued without consideration to Kansteiner, Inc., still section 58 of the Negotiable Instruments Act, Cahill's St. Ch. 93, Par. 78, which provides that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable, answers the contention of the plaintiff. Kansteiner, Inc. was not a holder in due course, and the receipt of the notes by the plaintiff after maturity makes the claim of this plaintiff subject to the defense interposed by the defendant * * *."

In the hands of any holder of a note, a negotiable instrument is subject to the same treatment as it is to a non-negotiable one. The holder who gives his title to a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder.

It is also noted that the judgment is against the weight of the evidence, and a careful analysis of all the evidence fails to convince that the finding of the court was against the manifest weight of the evidence.

Other points are urged but only serious question presented by this appeal is whether defendant is chargeable with the defects in Larkin's title to the bonds, and having admittedly purchased the bonds after maturity, the delivery of the bonds to him by Larkin, who secured possession of them through fraudulent means, could not vest a valid title in defendant.

In Larkin v. Broadway Tr. & Inv. Co., 188 Ill. 401, 402, 174-5, in discussing the question of the purchase of securities before and after maturity, this court said:

"Two controlling questions arise upon the record: (1) Are the defenses, which are in dispute, available to this court? (2) Assuming negotiability, were the same defenses available to defendant in the transaction in Chicago? If the same were not negotiable or overdue at that time, then defendant could take the same subject to limitations, not being a holder in due course; but if they were negotiable and not due, even a holder could give good title to one taking for value and in good faith."

In turning upon the same question in Bank v. Larkin,

Y. Broadway-Exchange and Tr. Co., 188 Ill. 402, 410, the following

language was used by the court:

"The note maturing July 20, 1927, was received after maturity, the plaintiff having no knowledge that this note was an accommodation and issued without consideration to Larkin, Inc., still owner of the negotiable instrument at Larkin's death. The plaintiff provided that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as it is to a non-negotiable one. The court found that the plaintiff, defendant, and the holder in due course, and the result of the note by the plaintiff after maturity makes the claim of this plaintiff subject to the same defenses by the defendant."

This transaction was attended and surrounded by many peculiar and suspicious circumstances which would unquestionably have justified us in affirming the judgment of the trial court on other grounds if a further analysis and discussion of the evidence were necessary for a decision of this case.

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

The first section has already been mentioned by name
regularly and received as direct work when well organized
have justified us in allowing the judgment of the trial court
on other grounds if a further analysis and discussion of the
evidence were necessary for a decision of this case.

For the reasons indicated herein the judgment of the

trial court is affirmed.

WRITTEN.

Chief Justice, J. J. Conroy.

36310

J. P. BUENEMANN and
G. F. KNAFF, doing
business as BUENEMANN
& KNAFF,

Appellants,

v.

HARRY P. MURNS,

Appellee.

39 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 599³

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of a judgment entered in the Municipal court against plaintiffs.

Plaintiffs' statement of claim alleged that April 24, 1929, they were employed by Hassel's Hungarian Restaurant & Food Shop, Inc., (hereinafter referred to as the corporation) to adjust a fire loss sustained by it in its premises at 12 West Elm street, April 24, 1929; that the corporation agreed by and through John Hassel, its president, to pay plaintiffs five per cent (5%) of the total amount of the adjusted claim; that in accordance with said agreement they negotiated with all of the insurance companies which had issued policies on said premises and adjusted said claim with the companies for the amount of \$10,480; that defendant herein is an attorney at law who represented the insured and that after said adjustment was made with the insurance companies plaintiffs informed defendant herein that the settlement had been made, but that before the drafts in payment of the loss were issued by the companies, plaintiffs would require the said Hassel, or the corporation, to direct that the draft covering the settlement include the names of plaintiffs as payees in order that they might be

L. J. BROWN and
 G. J. BROWN, being
 business as BROWN
 & BROWN,
 Appellants,
 v.
 HARRY V. BROWN,
 Appellee.

APPEAL FROM MUNICIPAL
 COURT OF CHICAGO.

STILL A. 599

THE COURT THEREON AFFIRMS THE DECISION OF THE COURT.

This appeal attacks the reversal of a judgment entered

in the Municipal Court against plaintiff.

Plaintiff's statement of claim alleged that April 24,

1935, they were employed by Russell's Hungarian Restaurant & Food

Shop, Inc., (hereinafter referred to as the corporation) to

adjust a fire loss sustained by it in its premises at 12 west

Kim street, April 24, 1935; that the corporation agreed by and

through John Russell, its president, to pay plaintiff's five per

cent (5%) of the total amount of the adjusted claim; that in

accordance with said agreement they negotiated with all of the

insurance companies which had issued policies on said premises

and adjusted said claim with the companies for the amount of

\$10,400; that defendant herein is an attorney at law who

represented the insurers and that after said adjustment was made

with the insurance companies plaintiff's balance defendant

herein that the settlement had been made, and that before the

drafts in payment of the loss were issued by the companies,

plaintiff would receive the said benefit of the corporation,

so direct that the draft covering the settlement in favor of

names of plaintiff's or payee in order that they might be

protected on their commission for services; that defendant thereafter informed plaintiffs that the said corporation and John Hassel refused to give the insurance companies an order authorizing them to insert the names of plaintiffs as co-payees in the drafts; that thereupon plaintiffs informed said defendant that they would immediately proceed to protect themselves on their commission, either by way of filing an attachment and garnishment suit against the insurance companies, or by advising all of the said companies to hold up payment of the loss to the said corporation or John Hassel; that in consideration of plaintiffs withholding any action in the matter, defendant agreed that if the insurance companies would include defendant's name as one of the payees in the drafts, that he, defendant, would at the time said drafts were issued either cash said drafts and pay plaintiffs their commission, or that he would not indorse said drafts until the commission of plaintiffs was paid; and that contrary to the terms of said agreement defendant had indorsed said drafts issued by the insurance companies and delivered all the proceeds thereof to John Hassel or said corporation, and that said corporation and John Hassel have failed and refused to pay said \$524 due plaintiffs as commission for services, and that the said corporation is out of business and has no assets with which to satisfy a judgment, and that by reason of the failure of defendant to carry out the terms and conditions of his agreement with plaintiffs, they were damaged to the extent of \$524, and defendant became and is indebted to them in the sum of \$524.

The material allegations of the affidavit of merits filed by defendant in defense of this claim are as follows:

"Defendant admits that plaintiffs adjusted the losses of the Hassel's Hungarian Restaurant & Food Shop, Inc., with the various insurance companies for the sum of \$10,480, but denies that he ever agreed to protect the plaintiffs herein on their commission as set forth in said statement of claim.

"Affiant states that plaintiffs at no time informed him that they, the plaintiffs, would file any attachment or garnishment suit against the insurance companies or advise all of said insurance companies to hold up payment of said loss to

said Hassel's Hungarian Restaurant & Food Shop, Inc., or to John Hassel, as set forth in statement of claim.

"Affiant further states that the insurance policies had named as payees therein, Jac. Lederer, Inc., Hassel's Hungarian Restaurant & Food Shop, Inc. and Albert Pick & Company, with the exception of one policy; that plaintiffs knew that Lederer and Pick had chattel mortgages on the equipment covered by said insurance; that plaintiffs knew that the settlement could not be consummated with said insurance companies until Lederer and Pick had received the money due them under the mortgage clause contained in said policies; that there were garnishment suits filed or about to be filed against said insurance companies tying up the payment of said insurance funds; that at no time had there ever been any accounts stated between the insurance companies and the Hassel's Hungarian Restaurant & Food Shop, Inc., showing when the funds would be paid or whether or not the funds were free from attachment or garnishment.

"Affiant further states that he filed a suit against the various insurance companies for Hassel's Hungarian Restaurant & Food Shop, Inc., at Kankakee, Illinois; that he went to considerable expense in securing photostatic copies, and in payment of court costs and fees due the attorney in that city to prosecute the suits. Affiant states that he insisted upon the check of the Milwaukee Mechanics Insurance Company being made out in his name so as to protect himself for the moneys advanced by him in behalf of the Hassel's Hungarian Restaurant & Food Shop, Inc., and not as set forth in plaintiffs' said statement of claim.

"Affiant further states that he at no time received any money from said Hassel's Hungarian Restaurant & Food Shop on account of any insurance loss arising out of the proceeds of said insurance policies.

"Affiant further states that the checks issued by the insurance companies were delivered to the payees therein, Jac. Lederer and the Hassel's Hungarian Restaurant & Food Shop, Inc. and were used, so this affiant is informed and believes, to pay the chattel mortgage indebtedness of said Hassel's Hungarian Restaurant & Food Shop, Inc.; that no funds were paid by the said Hassel's Hungarian Restaurant & Food Shop, Inc., to this affiant as a result of said adjustment; that there is nothing due plaintiffs from this defendant."

No question of law is presented by this appeal, the plaintiffs' sole contention being that the trial court erred in finding the issues against the plaintiffs.

The allegations of the statement of claim apparently relied upon by the plaintiffs as constituting a legally binding contract between defendant and plaintiffs, and which the plaintiffs insist defendant breached, are as follows:

"Thereupon, the plaintiffs informed the said defendant that they would immediately proceed to protect themselves on their commission, either by filing an attachment and garnishment suit against the Insurance Company, or by advising all of the companies to hold up payment of the loss to said corporation or John Hassel; plaintiffs further allege that in consideration of the plaintiffs withholding any action in the matter, the defendant agreed that if the Insurance Company would include the defendant's

name as one of the payees in the draft, that he, the defendant, would at the time said drafts were issued, either cash said drafts and pay to the plaintiffs their commission, or that he would not endorse said drafts until the commission of the plaintiffs was paid."

The evidence disclosed that there had been a fire in the restaurant conducted by the corporation which resulted in practically a total loss of its fixtures and contents and that the corporation engaged the service of plaintiffs to adjust the loss occasioned by the fire with the several insurance companies that had issued policies covering same, under the following contract:

"NOTICE OF LOSS AND CONTRACT.

"To the _____ Ins. Co. and other insurers. Kindly take notice that on the 24th of April, 1929, we suffered loss by fire at No. 12 W. Elm Street and have employed Buemann & Knapp to assist in the adjustment of our claim and for services rendered we hereby assign and set over unto them the sum of 5% of total amount adjusted claim.

"(Signed) Hassel's Hung. Rest. & Food Shop
"By John Hassel, Pres."

The undisputed evidence further disclosed that in accordance with the terms of this contract plaintiffs negotiated a compromise settlement with the several insurance companies involved; that by reason of the fact that all of the policies except one contained chattel mortgage clauses the fire insurance companies were obliged to make the settlement drafts payable to the mortgagees as well as to the insured, except in the one instance referred to; that the one policy that did not contain a mortgage clause was that issued by the Milwaukee Mechanics Insurance Company; that after plaintiffs had negotiated the compromise adjustment of the fire loss with all of the insurance companies involved they submitted to John Hassel, the president of the restaurant corporation, the written compromise agreements of the various insurance companies, as well as a form of assignment to plaintiffs of the interest of the corporation in the Milwaukee Mechanics Insurance Company policy; that Hassel signed the several compromise agreements which provided

for a total payment of \$10,480 to cover the fire loss, but he refused to execute the assignment to plaintiffs of the corporation's interest in the Milwaukee Mechanics Insurance policy under which \$1197.17 was payable as that company's share of the fire loss; and that defendant represented the insured corporation in its dealings with plaintiffs after they had been retained to adjust the fire loss.

Plaintiffs' testimony indicated that prior and subsequent to Hassel's refusal on behalf of the corporation to execute the assignment to them of the insured corporation's interest in the Milwaukee Mechanics Insurance Company policy they were suspicious that Hassel, as president of the corporation, did not intend to pay them for the services which were rendered by them and that they imparted their suspicions to defendant.

The plaintiff Buemann testified that after Hassel's refusal to execute the assignment on behalf of the corporation, he informed defendant that he contemplated garnishment or attachment proceedings against the insurance companies for the funds in their possession belonging to the corporation as a result of the compromise settlement, and that the defendant agreed that if plaintiffs desisted from their contemplated legal proceedings and arranged with the Milwaukee Mechanics Insurance Company that defendant be named a co-payee in the draft issued by that company for its share of the fire loss, defendant would see that plaintiffs were paid for their services in adjusting the loss or in any event that defendant would refuse to indorse the draft unless plaintiffs were paid; that defendant informed him that he was entitled to an attorney's lien against the proceeds of this policy for court costs and other expenses which defendant had advanced in connection with certain suits instituted against the insurance companies on behalf of the insured to compel the payment of the claim for this fire loss, and

For a period of 10,000 years in the past, but in
order to receive the same as to the rights of the corporation's
interest in the same. The same interest in the same which
1127.12 was made as that of the same of the same;
and that interest represented the interest of the same in the
same. The same after they had been received to which
the same was.

that they had no knowledge of the activities of the corporation at the time of the investigation.

the plaintiff's complaint is that the defendant's refusal to accept the assignment on behalf of the corporation, and its failure to pay the plaintiff's claim, is a breach of the contract between them. The plaintiff claims that the defendant's refusal to accept the assignment is a breach of the contract between them, and that the defendant's failure to pay the plaintiff's claim is a breach of the contract between them. The plaintiff claims that the defendant's refusal to accept the assignment is a breach of the contract between them, and that the defendant's failure to pay the plaintiff's claim is a breach of the contract between them.

that defendant was named as one of the payees in the Milwaukee Mechanics Insurance Company draft and subsequently indorsed same without seeing to it that plaintiffs were paid for their services out of the proceeds of the draft.

It appeared that, although there was no mortgage clause in this particular policy, the principal mortgagee, Jno. Lederer, who held a chattel mortgage on the restaurant fixtures for approximately \$8000, was also named as one of the payees in the draft issued by this company because of an error in the issuance of its draft by one of the other insurance companies; that defendant indorsed the draft in Lederer's office and that he received no part of the proceeds of this check.

Buenemann was the only witness that testified as to the alleged agreement by defendant "to see to it" that plaintiffs were paid for their services out of the proceeds of this particular draft.

Defendant vigorously denies that he ever entered into any such agreement or that he at any time intimated or suggested that plaintiffs refrain from instituting legal proceedings against the insured corporation or the insurance companies or taking any other steps which they deemed necessary or expedient to protect their claim, and insists that he never promised them that he would secure the amount of their claim out of the proceeds of the draft or that he would refuse to indorse same in consideration of their forbearance in not instituting legal proceedings to enforce their claim.

Defendant testified that plaintiffs, notwithstanding their contract provided for a fee of 5% for the amount of the adjusted claim, insisted on a fee of 8% after the matter had been adjusted and that that was the real reason why the corporation refused to make the requested assignment or to pay the claim.

The contract entered into between plaintiffs and the corporation contained an assignment of 5% of the amount of the

that it was one of the persons in the business who had been
 and who had been paid for their services
 and of the proceeds of the sale.
 It appeared that, although there was no mortgage placed
 in this particular policy, the principal mortgage, the mortgage
 who had a vested mortgage on the property for
 approximately \$100,000, was also one of the persons in the
 draft issued by this company because of an error in the language
 of the draft by one of the other insurance companies that delayed
 and instead the draft in the company's office and that he received
 no part of the proceeds of this check.
 The company was the only one that received it to the
 alleged agreement by the company "to see to it" that plaintiffs were
 paid for their services out of the proceeds of this particular draft.
 Defendant vigorously denied that he ever entered into any
 such agreement or that at any time intended or suggested that
 plaintiffs refrain from instituting legal proceedings against the
 insured company or the insurance companies or taking any other
 steps which they deemed necessary or expedient to protect their
 claim, and stated that he never promised them that he would secure
 the amount of their claim out of the proceeds of the draft or that
 he would refuse to insure same in consideration of their forbearance
 in not instituting legal proceedings to enforce their claim.
 Defendant testified that plaintiffs, notwithstanding their
 contract provided for a fee of 10% for the amount of the adjusted
 claim, insisted on a fee of 25% after the claim had been adjusted
 and that that was the final reason why the corporation refused to
 make the required payment of 25% of the claim.
 The contract entered into between plaintiffs and the
 corporation provided for the payment of 10% of the amount of the

adjusted claim and plaintiffs could have amply protected themselves as to that amount if they had seen fit to do so. They admit that they were not satisfied with the 5% commission and endeavored to get 8% from the corporation for their services. It is apparent that their 5% assignment would not avail to get the 8% and hence their effort to have the corporation assign its interest in the Milwaukee Mechanics Insurance Company policy to them. They were shooting for larger game and in the hunt lost out on what was immediately at hand.

The obligation to pay for the services rendered by plaintiffs was primarily that of the insured corporation and the claim advanced in this cause that defendant obligated himself to pay his clients' indebtedness is to say the least unusual and extraordinary. There was a sharp conflict in the evidence and the trial court had the advantage of hearing and observing the witnesses.

The only question presented by this record is one of fact and a careful analysis of all the evidence fails to convince us that the finding of the court was against the manifest weight of the evidence.

For the reasons stated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

~~XX~~

Gridley and Scanlan, JJ., concur.

36322

FRED H. HENKE, Trustee,
et al.,

Appellees,

v.

EDWARD GREVY et al.

ON APPEAL OF WILLIAM C.
CROLIUS,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

271 I.A. 599⁴

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of an order of the Circuit court of Cook county denying the petition of the defendant William C. Crolius to vacate the decree entered in this cause February 26, 1931.

September 6, 1927, appellee Fred H. Henke, as trustee, and the Bremen State Bank, a corporation, (hereinafter referred to as plaintiffs) filed their bill to foreclose a trust deed given to secure a note for \$3,500, which by its terms was then past due. The bill alleged that the property was owned by William C. Crolius, although the title of record was in his son, John R. Crolius. The bill was taken as confessed against the defendant Grevy and his wife, and the answer of the defendants William C. Crolius, Margaret M. Crolius, his wife, and John R. Crolius, did not deny any of the allegations of the bill except the one alleging default in payment.

There was a reference to a master in chancery and he found that John R. Crolius held title in trust for William C. Crolius; found the amount due plaintiffs and recommended the entry of the usual decree of sale. The defendant William C. Crolius

THOMAS H. HANKE, Trustee,
et al.,
Appellees

v.

KURTZ COMPANY et al.,

ON APPEAL FROM THE
COURT OF APPEALS,
Appellants.

ATLANTA TERM CIRCUIT COURT,
COOK COUNTY.

271 I.A. 599

THE FOLLOWING IS THE OPINION OF THE COURT.

This appeal seeks the reversal of an order of the

Circuit court of Cook county denying the petition of the

defendant William C. Groves to vacate the decree entered

in this cause February 20, 1931.

September 4, 1927, appellees Fred H. Hanke, as trustee,

and the Kutz Company, a corporation, (hereinafter referred

to as plaintiffs) filed their bill to rescind a trust deed

given to secure a note for \$5,000, which by its terms was then

past due. The bill alleged that the property was owned by

William C. Groves, although the title of record was in his

name, John H. Groves. The bill was taken as confessed against

the defendant Kutz Company and his wife, and the answer of the defendant

William C. Groves, denying it. Groves, his wife, and John H.

Groves, his not deny any of the allegations of the bill except

the one alleging default in payment.

There was a reference to a master in equity and he

found that John H. Groves held title in trust for William C.

Groves; found the amount due plaintiffs and recommended the entry

of the usual decree of sale. The defendant William C. Groves

filed objections to the report and when they were presented to the court with the report of the master he informed the court that he had procured another loan to pay off this indebtedness, but that plaintiffs had prevented him from getting this loan by stating that they were going to renew the existing mortgage. He also advised the court that he offered proof of this before the master which the master refused to hear. June 27, 1928, the court sustained the objections to the report and rereferred the case to the master for further hearing. When the case was finally called before the master August 15, 1928, Crolius offered no evidence but entered into the following stipulation with plaintiffs and the owner of the second mortgage:

"August 15, 1928.

CIRCUIT COURT OF COOK COUNTY.

Fred H. Henke, as Trustee)	
V.)	No. B-151283
Edward Greevy et al.)	STIPULATION

It is hereby stipulated and agreed by and between William C. Crolius, one of the defendants to the above entitled cause, and the complainants by Francis A. Harper, their solicitor of record that the Master in Chancery C. Arch Williams, shall make up his supplemental report in above cause on the testimony heretofore heard and that complainants will not present said report to the court nor ask for a decree thereon until November 15, 1928, and that no objections shall be filed to said report, and no notice required when presented. No additional costs to be incurred after Master in Chancery's supplemental report. Dated August 15, 1928.

Filed	William C. Crolius,
C. Arch Williams	Francis A. Harper,
<u>Master</u>	<u>Solr for Complainants</u>
	Hans Vick
	By Roy E. Olin, his Solr."

It appeared that November 13, 1928, defendant William C. Crolius advised plaintiffs that he needed more time to pay the mortgage than the ninety days granted him under the stipulation; that a special meeting of the directors of the Bremen State Bank, which owned the first mortgage note involved in this proceeding, was called for

filed objection to the report and also that they were present to the extent of the report at the hearing in the court. That he had procured necessary funds to pay off this indebtedness, but that defendant had prevented him from getting this loan by stating that they were going to remove the existing mortgage. He also advised the court that he offered proof of this before the court when the court refused to hear it. June 21, 1932, the court sustained the objection to the report and referred the case to the master for further hearing. When the case was finally called before the master August 1, 1932, Grodin offered no evidence but entered into the following stipulation with plaintiff and the owner of the second mortgage:

"August 10, 1932.

STIPULATION OF GRODIN AND THE OWNER OF THE SECOND MORTGAGE.

That the parties to this stipulation are:
 Fred A. Grodin, as Plaintiff
 V.
 Edward Grodin, as Defendant.

It is hereby stipulated and agreed by and between Plaintiff and the Defendant as follows:
 That the Plaintiff, Fred A. Grodin, is the owner of the property described in the mortgage of August 10, 1932, and that the Defendant, Edward Grodin, is the owner of the second mortgage on the property described in the mortgage of August 10, 1932, and that the parties to this stipulation are:
 Fred A. Grodin, as Plaintiff
 V.
 Edward Grodin, as Defendant.

Witness my hand and seal this 10th day of August, 1932.
 Fred A. Grodin,
 Plaintiff.

Filed
 U. S. Court, Illinois
 Eastern District

By Fred A. Grodin, his attorney.

It is further stipulated and agreed by and between Plaintiff and the Defendant as follows:
 That the Plaintiff, Fred A. Grodin, is the owner of the property described in the mortgage of August 10, 1932, and that the Defendant, Edward Grodin, is the owner of the second mortgage on the property described in the mortgage of August 10, 1932, and that the parties to this stipulation are:
 Fred A. Grodin, as Plaintiff
 V.
 Edward Grodin, as Defendant.

that evening and Crolius appeared before the bank directors and stated that he would have sufficient income from the business of his factory, which was located on the property covered by the trust deed, to pay both the first and second mortgages before the end of the year 1928; that acting on this assurance the directors agreed that no decree would be entered prior to the first of the year 1929; that the defendant paid \$587.16 on the first mortgage note the next day, November 14, 1928, as well as other sums to apply on master's fees and interest and attorney's fees to the owner of the second mortgage note; that defendant made no further payments that year and early in the year 1929 asked for additional time; that defendant paid other amounts on plaintiffs' mortgage so that it had been reduced to \$1784.38, November 17, 1930, and that no payments were made after that date; and that February 26, 1931, plaintiffs caused a decree of sale to be entered for the balance unpaid on the mortgage in the amount of \$1718.30.

Within the term William C. Crolius filed a petition to vacate this decree and subsequently filed an amended petition, the material allegations of which are that the decree was secured without notice to the defendants and that same was secured through fraud and deceit; that a stipulation was entered into August 15, 1928, that no report would be filed by the master and no decree entered until November 15, 1928, pending an adjustment of the mortgage; that November 14, 1928, defendants entered into an agreement with the Bremen State Bank, the owner of the first mortgage and Hans Vick, the owner of the second mortgage, wherein and whereby defendant William C. Crolius paid the bank the sum of \$587.16 and agreed to pay the balance due by assigning the invoices of the William C. Crolius Co. to the bank from time to time; that the petitioner assigned invoices approximating \$4,200 and there had been paid to the bank the sum of \$3,252, including payment of

that evening and calling upon the bank officers and
 stated that he would have sufficient income from the business of
 his factory, which was located on the property covered by the
 trust deed, to pay both the first and second mortgages before the
 end of the year 1928; that acting on said assurance the directors
 agreed that no decree would be entered prior to the first of the
 year 1929; that the defendant paid \$337.15 on the first mortgage
 note the next day, November 14, 1928, as well as other sums to
 apply on master's fees and interest and attorney's fees to the
 owner of the second mortgage note; that defendant made no further
 payments that year and until in the year 1929 when for additional
 time; that defendant paid other amounts on defendant's mortgage
 so that it had been reduced to \$172.35, November 17, 1929, and
 that no payments were made after said date; and that February 28,
 1931, plaintiff moved a decree of sale to be entered for the
 balance unpaid on the mortgage in the amount of \$172.35.
 Within the term William G. Crolier filed a petition to
 vacate this decree and subsequently filed an amended petition,
 the material allegations of which are that the decree was secured
 without notice to the defendant and that same was secured through
 fraud and deceit; that a stipulation was entered into August 12,
 1928, that no report would be filed by the master and no decree
 entered until November 14, 1928, pending an adjustment of the
 mortgage; that November 14, 1928, defendant entered into an
 agreement with the Western State Bank, the owner of the first
 mortgage and Hans von, the owner of the second mortgage, wherein
 and whereby defendant William G. Crolier paid to the bank the sum of
 \$337.15 and agreed to pay the balance due by retaining the proceeds
 of the William G. Crolier Co. in the bank from time to time; that
 the petitioners retained interest approximately \$4,500 and there had
 been paid to the bank the sum of \$5,232, including payment of

\$411.09 by W. B. Crane Co., and \$132.65 by John Brennan & Co. since the entry of the decree; that the decree was entered after one Francis A. Harper appeared before the Hon. Philip A. Sullivan and represented falsely and fraudulently that the business of the petitioner was no longer conducted and the plant closed; that the petitioner had no knowledge of the entry of the decree until March 8, 1931, when George J. Massey, the original solicitor of record for defendants, received a notice of the sale from Master Welch, and that the stipulation was binding only on the petitioner and not on Margaret M. Crolius or John R. Crolius, the other defendants.

Plaintiffs filed an answer denying all of the material allegations of the amended petition and charged that Crolius had attempted by untruths, deceit and deliberate misstatements to delay the efforts of plaintiffs to collect this indebtedness since the inception of the litigation, September 6, 1927.

The cause was referred to a master in chancery for a hearing on the amended petition to vacate the decree and the answer thereto and the master submitted his report to the court finding that defendant William C. Crolius was not notified of the entry of the decree of foreclosure and sale, but that he was not entitled to such notice because he was bound by the stipulation of August 15, 1928, supra, in and by which he specifically waived notice, and that inasmuch as Margaret M. Crolius and John R. Crolius, the other defendants, did not join in the petition to vacate the decree, any interest that they might have had in the subject matter of the litigation was not presented for the determination of the court. July 6, 1932, the trial court, after a hearing on the amended petition to vacate, the answer of the plaintiffs (respondents) and the report of the master, dis-

missed the petition to vacate the decree and ordered the master to proceed with the sale under the decree.

Defendant William C. Crolius in his petition to vacate the decree alleged that November 14, 1928, he and the owners of the first and second mortgages entered into an agreement extending the maturity of the mortgage for an indefinite period; that he had paid the bank \$3252 to apply on the mortgages and that \$543.74 had been paid since the entry of the decree. Notwithstanding the fact that these allegations and others of similar import were specifically denied by the answer of plaintiffs, the defendant William C. Crolius made no attempt to offer any evidence on the hearing before the master to substantiate them. The sworn answer of the plaintiffs averred that William C. Crolius in February, 1931, requested of the Bremen State Bank and received a statement showing his payments and the balance due on the first mortgage and that Crolius never disputed this statement of the bank showing a balance still due on the first mortgage note in the sum of \$1784.38, the amount found to be due by the terms of the decree. In spite of the fact that there is not a scintilla of evidence in the record of any payments after the decree, Crolius contends that the solicitor for plaintiffs made an admission before the master that \$700 had been paid since the entry of the decree.

We find no support for this contention except the specious argument of counsel. This argument is refuted by defendant's claim that the amount he did pay was considerably less than \$700. We find Crolius strenuously contending and delaying the entry of this decree for nearly four years, but when the opportunity is presented for sworn testimony showing payment after decree or payments before the date of the decree, that he has not been credited with, we find him silent. An examination of the record discloses no intention on the part of the solicitor for plaintiffs to make any admission of

about the position of the witness and several other matters as
presented with the case under the law.

Witness William C. Groves in his position as witness

the above alleged that between 1918, 1919, and the coming of
the first and second mortgages entered into an agreement concerning
the security of the mortgage for an indefinite period; that he had
been the bank agent on the mortgage and that 1918-19 had
been paid since the entry of the decree. The testimony of the fact
that these allegations and others of similar nature were specifically
denied by the answer of plaintiff, the defendant William C. Groves

made no attempt to offer any evidence as to the matter before the
court in substance above. The main answer of the plaintiff
averred that William C. Groves in 1918-19, 1919, 1920, and
the Western State Bank and received a mortgage securing his payment
and the balance due on the first mortgage and that Groves never
disputed this statement of the bank during a period of all time on
the first mortgage note in the sum of \$17,445.50, the amount being
as he was by the terms of the decree. In fact of the fact that
there is was a failure of evidence in the record of any payment
after the Western State Bank received the balance of the plain-
tiff was an admission before the court that it had been paid
since the entry of the decree.

The fact on which the defendant made the statement
admitted in court. This statement is denied by defendant's claim
that the amount he had paid was actually paid from 1918 to 1919
Groves defendant denies the fact of the entry of the decree
the entry of the decree, and that the statement is given for
more testimony showing that the entry of the decree before the
date of the decree, that he has not been credited with the sum
of \$17,445.50. In connection of the second statement he introduced
as the part of the evidence for plaintiff he made any admission of

payments after decree and in our opinion the master properly found that no payments were made before or after the decree that had not been honestly credited to Crolius.

The defendant, William C. Crolius, contends that a fraud was perpetrated upon the court and upon him and the other defendants when the decree was entered without giving them notice.

It appears that William C. Crolius was not only the real party in interest but the active defendant in this proceeding; that he originally secured the mortgage and carried on all negotiations respecting its payment since the bill was filed in this case and that he, and he only, made whatever payments were made on the mortgage. It was he who entered into the stipulation of August, 15, 1928, waiving notice and other rights in consideration of an extension of time for the payment of the mortgage note and we are of the opinion that the entry of the decree without notice to him was entirely proper in view of his stipulation.

Whether or not it was intended by the parties that his stipulation should also bind the other defendants is immaterial in the present state of the record. They did not join in the petition to vacate the decree and they are, therefore, bound by its terms.

It is also contended that the decree is against the weight of the evidence, but a careful examination of the record convinces us that the decree was in accord with the manifest weight of the evidence. We find no basis in the record for the charges of fraud which have been so freely advanced against the solicitor for the plaintiffs but, on the contrary, it is our opinion that defendant was not only treated considerately but that he was even indulged by plaintiffs, who, although there never was a meritorious defense to this action and none is now claimed, permitted the defendant to delay the entry of the decree in this cause for almost four

payments after decree and in our opinion the same were properly made
that no payments were made before or after the decree and had not
been honestly credited to the estate.

The defendant, William D. Griffin, contends that a fund
was designated upon the record and upon him and the other defendants
when the decree was entered without giving them notice.

It appears that William D. Griffin was not only the party
party in interest but the active defendant in this proceeding; that
he originally secured the mortgage and entered on all negotiations
respecting the payment since the bill was filed in this case and
that he, and he only, made whatever payments were made on the
mortgage. It was he who entered into the stipulation of 1926,
1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938,
extension of time for the payment of the mortgage note and we are
of the opinion that the entry of the decree without notice to him
was entirely proper in view of his stipulation.

Whether or not it was intended by the parties that his
stipulation should also bind the other defendants is immaterial in
the present state of the record. They did not join in the petition
to vacate the decree and they are, therefore, bound by its terms.

It is also contended that the decree is against the
weight of the evidence, but a careful examination of the record
convince us that the decree was in accord with the weight of
the evidence. We find no basis in the record for the charges
of fraud which have been so freely advanced against the petitioner
for the plaintiff but, on the contrary, it is our opinion that
defendant was not only treated completely but that he was even
induced by plaintiff, who, although there never was a mortgage
decreed in this action and now is now claimed, retained the fund
and so delay the entry of the decree in this case for almost four

years on his repeated promises to pay the amount of the indebtedness.

Other contentions have been urged, but inasmuch as they do not affect the equities of the parties to this proceeding, we deem it unnecessary to discuss them.

For the reasons stated herein we are of the opinion that the Circuit court did not err in entering the order to dismiss the petition to vacate the decree for want of equity and the order is therefore affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

years of his repeated promises to pay the amount of the indebtedness.

That compensation was never made, but inasmuch as they do not affect the validity of the practice in this proceeding, we

have no occasion to discuss them.

For the reasons stated in the opinion that the circuit court did not err in entering the order to dissolve the petition to vacate the license for want of equity, we affirm the judgment of the circuit court.

THIRD.

Replevin and detainer, U.S. Circuit Court.

36435

WARSHAWSKY & CO., a Corporation,
Appellee,

vs.

A. WARSHAWSKY & COMPANY, INC.,
a Corporation, et al.,
Defendants.

On Appeal of WARSHAWSKY &
WARSHAWSKY, INC.,
Appellant.

4 / A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

271 I.A. 600¹

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the Superior court finding respondent Warshawsky & Warshawsky, Inc., guilty of contempt by reason of its violation of injunctional decrees theretofore entered by the court and imposing a fine of \$500.

The facts in this case are identical with the facts in Warshawsky & Co., a Corporation, vs. A. Warshawsky & Company, Inc., a Corporation, et al., on appeal of Arthur Warshawsky, General No. 36437, (opinion filed by Second division of this court concurrently with this opinion, June 30, 1933.)

The order entered below in that case was the same as in this except as to the punishment, and the same questions were there presented for review. The reasons set forth in that opinion and the conclusions reached are equally applicable to this appeal, and in our opinion the Superior court did not err in entering the order finding the respondent guilty of contempt for violation of the injunctional decrees of the court and imposing a fine of \$500, and the order is therefore affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

WERNER & CO., a Corporation,
Appellee,

vs.

A. WERNER & COMPANY, INC.,
a Corporation, et al.,
Plaintiffs.

On Appeal of WERNER &
WERNER, INC.,
Appellants.

IN THE SUPREME COURT
OF THE STATE OF NEW YORK

281 I.A. 600

MR. JUSTICE THOMAS delivered the opinion of the court.

This appeal arose to reverse an order of the Appellate court finding respondent WERNER & COMPANY, INC., guilty of conspiracy by reason of its violation of injunction decrees heretofore entered by the court and imposing a fine of \$500.

The facts in this case are identical with the facts in WERNER & CO., a Corporation, vs. A. WERNER & COMPANY, INC., a Corporation, et al., on appeal of A. WERNER & COMPANY, INC., et al., (opinion filed by Justice Thompson of this court concurrently with this opinion, June 20, 1933.)

The order entered below in that case was the same as in this except as to the punishment, and the same questions were thus presented for review. The reasons set forth in that opinion and the conclusions reached are equally applicable to this appeal, and in our opinion the Appellate court did not err in entering the order finding the respondents guilty of conspiracy for violation of the injunction decrees of the court and imposing a fine of \$500, and the order is hereby affirmed.

Ordered at Albany, N.Y., January 11, 1934.

THOMAS.

36436

WARSHAWSKY & CO., a Corporation,
Appellee,

vs.

A. WARSHAWSKY & COMPANY, INC.,
a Corporation, et al.,
Defendants.

On Appeal of CHARLES WARSHAWSKY,
Appellant.

42
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

271 I.A. 600²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the Superior court finding respondent Charles Warshawsky guilty of contempt by reason of his willful violation of injunctive decrees theretofore entered by the court and committing him to the common jail of Cook county for a period of four months.

The facts in this case are identical with the facts in Warshawsky & Co., a Corporation, vs. A. Warshawsky & Company, Inc., a Corporation, et al., on appeal of Arthur Warshawsky, General No. 36437, (opinion filed by Second division of this court concurrently with this opinion, June 30, 1933.)

The order entered below in that case was the same as in this and the same questions were there presented for review. The reasons set forth in that opinion and the conclusions reached are equally applicable to this opinion; therefore the order of the Superior court is affirmed as to that part of the order finding the respondent guilty of contempt for willful violation of the injunctive decrees of the court, and reversed as to that part of the order fixing the respondent's punishment, and remanded with directions to the Superior court to fix his punishment at imprisonment in the common jail of Cook county for a period of fifty days.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

WATSON & CO., a corporation,
Appellee,

vs.

A. WATSON & COMPANY, INC.,
a corporation, et al.,
Appellants.

On appeal of certain judgments,
doctors.

271 I.A. 600

IT IS ORDERED THAT THE COURT OF THE COUNTY

THIS ORDER BE REVERSED IN ORDER OF THE COURT

THE COURT REVERSED THE ORDER OF THE COURT

OF HIS WILLFUL VIOLATION OF THE INJUNCTIONAL DECREE

THE COURT AND REVERSED HIM TO THE COMMON JAIL OF COOK

COUNTY FOR A PERIOD OF FIVE MONTHS.

THE FACTS IN THIS CASE ARE IDENTICAL WITH THE FACTS IN

WATSON & CO., a corporation, vs. A. WATSON & COMPANY, INC.,

a corporation, et al., an appeal of certain judgments, doctors.

271 I.A. 600 (opinion filed by second division of this court concurrently

with this opinion, June 30, 1933.)

THE ORDER ENTERED BELOW IN THIS CASE WAS THE SAME AS IN THIS

AND THE SAME REASONS WERE THERE PRESENTED FOR REVIEW. THE REASONS

NOT LARGELY IN THIS OPINION AND THE CONCLUSIONS REACHED ARE EQUALLY

APPLICABLE TO THIS OPINION; THEREFORE THE ORDER OF THE SUPERIOR COURT

IS AFFIRMED AS TO THAT PART OF THE ORDER FINDING THE RESPONDENT GUILTY

OF CONTEMPT FOR VIOLATION OF THE INJUNCTIONAL DECREE OF THE

COURT, AND REVERSED AS TO THAT PART OF THE ORDER FINDING THE RESPONDENT

GUILTY OF CONTEMPT, AND REVERSED WITH DIRECTIONS TO THE SUPERIOR COURT

TO FIX HIS PUNISHMENT AT INCARCERATION IN THE COMMON JAIL OF COOK

COUNTY FOR A PERIOD OF FIVE MONTHS.

APPLIED IN PART, REVERSED IN PART

AND AFFIRMED WITH DIRECTIONS.

GRILLEY AND GORDON, JJ., concur.

36437

43 A

WARSHAWSKY & CO., a corporation,
Appellee,

v.

A. WARSHAWSKY & COMPANY, Inc., a
corporation, et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

ON APPEAL OF ARTHUR WARSHAWSKY,
Appellant.

271 I.A. 600³

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the Superior court finding respondent Arthur Warshawsky guilty of contempt of court by reason of his wilful violation of injunctional decrees theretofore entered by the court and committing him to the common jail of Cook county for a period of four months.

In the case of Warshawsky & Co., a corporation, v. A. Warshawsky & Company, Inc., a corporation, Charles Warshawsky, Arthur Warshawsky and Sarah Warshawsky, a decree was entered July 6, 1929, enjoining defendants from using the name "Warshawsky" in connection with their business, except under conditions imposed by the decree.

In an appeal to this court from that decree we held in our opinion in Warshawsky & Co. v. A. Warshawsky & Company, Inc., 257 Ill. App. 571, that the decree of the Superior court be affirmed in part and modified in certain other respects. Pursuant to the mandate of this court, the Superior court entered a modified injunctional decree June 30, 1930, the salient portions of which, and the portions with which we are concerned in this proceeding, are as follows:

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THIS SET OF NOTICES IS CONTAINED IN VOLUME 11, PART 1, OF THE

tail of each country for a period of four months.

in the case of "Krawnsky & Co.", a corporation, v. A. Krawnsky & Company, Inc., a corporation, Charles Krawnsky, Plaintiff, against Krawnsky and Krawnsky, a partnership, in 1922, obtained a judgment from a trial judge, in connection with their business, which under condition imposed by the court.

our opinion in Partnership Co. v. A. S. S. Co., 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 25

"From using, in the advertising, disposition, distribution or sale of new and secondhand automobile accessories, replacement parts, or in the sale and purchase of secondhand automobiles for wrecking purposes, or upon any letterheads, catalogues, literature, signs, advertising matter, or otherwise or verbally, the name of defendant corporation 'A. Warshawsky & Company, Inc.' or any similar name in which the word 'Warshawsky' is displayed, unless accompanied by the words 'not connected with Warshawsky & Co., a corporation,' said words to be in letters of the same size, type, script or writing as those by which said name or names are displayed.

"From using, in connection with the business of defendant corporation as now carried on, in advertisements or on signs, stationery, etc., the name of defendant corporation 'A. Warshawsky & Company, Inc.' or any similar name in which the word 'Warshawsky' is displayed, unless accompanied by the words 'not connected with Warshawsky & Co., a corporation,' in letters of the same size, type, script or writing as those by which said name or names are displayed."

November 7, 1930, complainant (hereinafter referred to as petitioner) filed a petition charging that defendants in the original and modified decrees (hereinafter referred to as respondents) wilfully, deliberately and continuously violated the terms of the injunctive decree originally entered by the Superior court, as well as the modified decree entered in pursuance of the mandate of this court, in that they failed to use in the conduct of their business the distinguishing legend "Not Connected with Warshawsky & Company," and that when they did use the distinguishing phrase on their signs, sales tickets, letterheads and other stationery and advertising matter they did not conform to the terms of the decree which provided that said words be in letters of the same size, type, script and writing as those by which said name or names are displayed; and prayed that a rule be entered upon respondents to show cause why they should not be held in contempt.

The court ordered respondents to show cause and this respondent filed an answer November 17, 1930, denying that he and the other respondents had wilfully disregarded and violated the decree and averred that they had at all times endeavored to comply substantially with the terms of the decrees, but admitted that they did not strictly comply with same and that the dis-

tinguishing phrase "Not Connected with Warshawsky & Company" as used by them was not in every instance of letters of the same size, type, script or writing as the name "Warshawsky."

When this cause came on for hearing April 16, 1931, the solicitor for the petitioner advised the court that an effort was being made to intimidate petitioner and its solicitor, so that it would desist from this prosecution, and that certain affidavits had been prepared and turned over to the state's attorney of Cook county that reflected on the integrity of the trial court, and charged petitioner, its solicitor and witnesses with unlawful and dishonest conduct in the trial of the original proceeding in the Superior court.

The chancellor thereupon directed solicitor for petitioner to prepare and file, and he did file as directed, a petition as the basis for a full investigation by the court, which petition alleged that since the filing of the petition of November 7, 1930, to enforce the decrees of the Superior court, certain officers of petitioner have been threatened with violence, and persons who appeared on behalf of petitioner have been interviewed to change their testimony, and that an investigation has been instituted in the state's attorney's office, upon certain affidavits, that petitioner and one of its solicitors have caused witnesses to be bribed at the trial of this cause; that said charges, statements, affidavits and rumors are false; that certain persons have stated that unless petitioner refrains from enforcing the decree prosecutions would be carried on; that the exact contents of the papers, documents and affidavits are unknown to petitioner; and that the court make a full and impartial investigation.

On the same day, April 16, 1931, but before the petition for the investigation of the above charges was filed, the chancellor proceeded with the hearing of evidence on the alleged violation of

submitting these "Not Guilty" pleas with "Not Guilty" as
 used by them was not in any instance of fact or of the same type,
 type, could be written as the same "Not Guilty".

When this case was on for hearing April 18, 1931, the
 solicitor for the petitioner advised the court that an effort was
 being made to identify the petitioner and the solicitor, so that
 it would result from this prosecution, and that certain affidavits
 had been prepared and turned over to the state's attorney of Cook
 County that reflected on the integrity of the trial court, and
 charged petitioner, the solicitor and witnesses with unlawful and
 dishonest conduct in the trial of the original proceeding in the
 Superior Court.

The chamberlain thereupon directed solicitor for petitioner
 to prepare and file, and he did file as directed, a petition as the
 basis for a full investigation by the court, which petition alleged
 that since the filing of the petition of November 7, 1930, to enforce
 the orders of the Superior Court, certain officers of petitioner
 have been threatened with violence, and persons who appeared on
 behalf of petitioner have been threatened to change their testimony,
 and that an investigation has been instituted in the state's
 attorney's office, upon certain affidavits, that petitioner and
 one of its solicitors have caused witnesses to be bribed as the
 trial of this cause; that said charges, affidavits, etc., were
 and known are false; that certain persons have stated that unless
 petitioner refrain from enforcing the order of the Superior Court
 be carried out that the secret contents of the report, comments
 and affidavits are unknown to petitioner and that the court
 make a full and impartial investigation.

On the same day, April 18, 1931, but before the petition
 for the investigation of the above charges was filed, the chamberlain
 proceeded with the hearing of evidence on the alleged violation of

the injunctive decrees, and after petitioner had presented on that issue such witnesses as were available, the court commenced an investigation of the charges of intimidation and alleged attempts to obstruct justice. In this investigation several witnesses were examined by the court and by solicitors for both petitioner and respondents and one hundred and fifty pages of testimony taken. April 24, 1931, the cause was continued without date and when the hearing was resumed May 12, 1932, nothing further was mentioned or ordered concerning the charges of intimidation and interference with the administration of justice, nor was any other evidence heard in connection with that investigation, nor any finding made on the evidence already heard, but the chancellor was advised that since the previous hearing a supplemental petition had been filed April 1, 1932, alleging that January 12, 1932, respondents had filed with the secretary of state of the State of Illinois a certificate of change of name of the respondent corporation from A. Warshawsky & Co., to Warshawsky & Warshawsky, and that respondents thereafter discontinued the use of any distinguishing phrase in the conduct of their business. The several answers of respondents to this supplemental petition admitted that after respondent corporation had changed its name to Warshawsky & Warshawsky it discontinued using the distinguishing phrase in any form, but averred that the name Warshawsky & Warshawsky was so dissimilar to the petitioner's name, Warshawsky & Company, that the use of the new corporate name did not constitute a violation of the injunctive decrees. At this hearing the chancellor announced his finding that the individual respondents Arthur Warshawsky and Charles Warshawsky were guilty of contempt and sentenced them to fifty days each in the county jail. When apprised that no evidence had been presented on behalf of respondents and that they desired to offer evidence in defense or mitigation no order was entered and the hearing was postponed. When the

the informational document, and the petitioner had presented on that issue such witnesses as were available, the court commenced an investigation of the charges of intimidation and alleged attempts to obstruct justice. In this investigation several witnesses were examined by the court and by solicitors for both petitioner and respondents and one hundred and fifty pages of testimony taken. April 22, 1951, the cases were continued without date and when the hearing was resumed May 12, 1951, nothing further was mentioned or ordered concerning the charges of intimidation and interference with the administration of justice, nor was any other evidence heard in connection with that investigation, nor any finding made on the evidence already heard, but the chancellor was advised that since the previous hearing a supplemental petition had been filed with the secretary of state of the State of Illinois a certificate of change of name of the respondent corporation from A. Karabawsky & Co., to Karabawsky & Karabawsky, and that respondents thereafter discontinued the use of any distinguishing phrase in the conduct of their business. The several names of respondents to this supplemental petition admitted that after respondent corporation had changed its name to Karabawsky & Karabawsky it discontinued using the distinguishing phrase in any form, but averred that the name Karabawsky & Karabawsky was so similar to the petitioner's name, Karabawsky & Company, that the use of the new corporate name did not constitute a violation of the informational document. At this hearing the chancellor announced his finding that the individual respondents Arthur Karabawsky and Louis Karabawsky were guilty of contempt and sentenced them to fifty days each in the county jail. He applied that no evidence had been presented on behalf of respondents and that they sought to obstruct justice in defiance of litigation and that they entered and the hearing was postponed. When the

hearing was resumed October 13, 1932, respondents offered in evidence the testimony of a photographer and certain photographs of respondents' premises, which were identified as having been taken by him, and the testimony of respondent Charles Warshawsky.

At the conclusion of all the evidence the chancellor found respondent corporation guilty of contempt and ordered said corporation to pay a fine of \$500; also found Arthur Warshawsky and Charles Warshawsky guilty of contempt and ordered them committed to the county jail for four months each.

The evidence was conclusive and respondents admitted by their answers that no serious effort was made by them to comply with the provisions of the injunctive decrees. While the original decree was pending in this court on appeal, respondents not only refused to comply with its terms but apparently made a studied effort to violate its provisions. They evinced neither the inclination nor desire to observe either the spirit or the letter of the decree from the day it was entered. After the modified decree was entered by the Superior court, pursuant to the mandate of this court, even less attention was paid to it, and from the conduct of respondents it is difficult to conclude that they took any more than faint cognizance of its provisions.

The modified decree ordered them to refrain from the use of the word "Warshawsky" in the conduct of their business, unless they used in connection therewith the distinguishing phrase "Not Connected with Warshawsky & Company," and unless the words constituting the distinguishing phrase were in the letters of the same size, type, script or writing as those by which said name was displayed. From July 6, 1929, when the original decree was entered and from July 30, 1930, when the decree was modified pursuant to the directions of this court, until January, 1932,

hearing was held October 1, 1932, respondent offered in evidence the testimony of a physician and certain photographs of respondent, pictures, which were identified as having been taken by him, and the testimony of respondent's attorney, as the conclusion of all the evidence in the case. The respondent corporation fully of contempt and ordered said corporation to pay a fine of \$500; also found respondent guilty of contempt and ordered them committed to the county jail for four months each.

The evidence was conclusive and respondent admitted by their answers that no serious effort was made by them to comply with the provisions of the injunction decrees. While the original decrees were pending in his court on appeal, respondent not only refused to comply with its terms but apparently made a studied effort to violate its provisions. They evaded neither the injunction nor desire to observe either the spirit or the letter of the decree from the day it was entered. After the modified decree was entered by the superior court, pursuant to the mandate of this court, even less attention was paid to it, and from the conduct of respondent it is difficult to comprehend how they took any more than faint cognizance of its provisions.

The modified decree ordered them to refrain from the use of the word "Vernamsky" in the conduct of their business, unless they used in connection with the establishing phrase "Not Connected with Vernamsky & Company," and unless the words constituting the establishing phrase were in the letters of the same size, type, script or writing as those by which said name was displayed. From July 1, 1930, when the original decree was entered and from July 1, 1931, when the decree was modified pursuant to the directions of this court, until January, 1932,

when the name of respondent corporation was changed to Warshawsky & Warshawsky, many signs of A. Warshawsky & Co. were placed, painted and hung on or about the place of business of respondents that made no pretext of carrying the distinguishing phrase. On several of the signs the prefix "A" in the firm name was so small as compared with the size of the letters in "Warshawsky" that it was almost inconspicuous. The evidence disclosed that, although for at least a portion of the time canvas signs bearing the distinguishing legend were attached to it, the large illuminated sign attached to the front of respondents' place of business was arranged or permitted to remain in such a manner that the only portion of the sign that was visible, especially at any considerable distance, was the word "Warshawsky."

Specimens of respondents' stationery were offered in evidence and not a single letterhead, sales ticket or other piece of printed matter used in their business complied with the terms of either decree. The distinguishing phrase as printed on the stationery was in practically every instance so small, so far removed from the name "Warshawsky," or so surrounded by other printed matter so as to be almost indiscernible.

Respondents contend that after the change of respondent corporation's name to Warshawsky & Warshawsky, in January, 1932, there was no further obligation to use the distinguishing phrase, inasmuch as the name as changed was so dissimilar to Warshawsky & Company that the reason for its use was obviated. The chancellor properly held that there was no merit in this contention. In our opinion the name as changed, without the use of the distinguishing phrase, was even more obnoxious to the provisions of the decree than the former name. Instead of the change rendering it dissimilar, it aggravated the offense by doubly emphasizing the similarity.

The attitude of respondents throughout this protracted litigation demonstrated that they had absolutely no respect for the court or its decrees. The continuous and persistent violations of the decrees were none the less wilful and flagrant by reason of the fact that on the hearing before the chancellor, and on this appeal, they seek to excuse or mitigate their offenses by declaring their acts were not wilful and that they meant and intended a substantial compliance with the provisions of the decrees. The fact is that they flouted both decrees and the best evidence of their intentions is that, while at times they thought they were being devious and subtle in their disregard of the injunctions of the court, their every act and entire course of conduct in their pretended compliance was openly contemptuous and defiant. Respondents urge that the chancellor was prejudiced against them by reason of the allegations of the petition, which charged intimidation and an attempt to obstruct the administration of justice, and also by reason of matters developed on the hearing subsequent to the filing of that petition. In our opinion the court was justified, and it was its duty to take cognizance of charges of so serious a nature, and proceed immediately and summarily with their investigation. It is true that the evidence taken in this investigation is included in the bill of exceptions presented as part of the record on this appeal, but strictly it has no proper place in the record. That was an independent investigation and evidence adduced in connection therewith had no bearing on the issue being tried on the petitions charging violation of the injunctive decrees.

While the evidence elicited in that extraneous inquiry was of such a nature and character as would cause any court to be incensed at the imputations made, we must assume that, although the disclosures had a natural tendency to arouse his righteous indignation, the chancellor in making his findings and entering his

The findings of respondents throughout this protested litigation demonstrated that they had no objection to the court or its decrees. The conditions and persistent violations of the decrees were none the less willful and flagrant by reason of the fact that on the hearing before the chancellor, and on this appeal, they seek to excuse or mitigate their offenses by declaring their acts were not willful and that they meant and intended a substantial compliance with the provisions of the decrees. The fact is that they flouted both decrees and the best evidence of their intention is that, while at times they thought they were being devious and subtle in their disregard of the injunctions of the court, their every act and entire course of conduct in their pretended compliance was openly contemptuous and defiant. Respondents urge that the chancellor was prejudiced against them by reason of the allegations of the petition, which charged investigation and an attempt to obstruct the administration of justice, and also by reason of matters developed on the hearing subsequent to the filing of that petition. In our opinion the court was justified, and it was its duty to take cognizance of charges of so serious a nature, and proceed immediately and summarily with their investigation. It is true that the evidence taken in this investigation is included in the bill of exceptions presented as part of the record on this appeal, but strictly it has no proper place in the record. That was an independent investigation and evidence obtained in connection therewith had no bearing on the issues being tried on the petition charging violation of the injunctive decrees. While the evidence elicited in that extensive inquiry was of such a nature and character as would cause any court to be concerned at the implications made, we must assume that, although the discoverer had a natural tendency to choose his righteous indignation, the chancellor in making his findings and entering his

orders in the instant case did not permit those extraneous matters to affect his judgment. The admissions of respondents and the clear, unmistakable evidence in the record were sufficient to justify the orders entered in this cause finding respondents guilty of contempt of the decrees of the Superior court.

The solicitor for respondents on the oral arguments of the appeal in this court conceded their guilt and suggested thirty days in the county jail the punishment he considered proper and commensurate with the offenses of the individual respondents.

Respondent contends that the punishment imposed by the court was excessive. As to this contention it is our opinion that, while the flagrancy of the violations of the decrees and the apparent open defiance of the court's orders were undoubtedly sufficient to warrant the penalty imposed, under all the circumstances and having in mind the extraneous matters presented to the trial court during the hearing of this cause and the possibility that the chancellor may have been influenced in some degree by them, we feel that the ends of justice will be best served by the imposition of the sentence of fifty days in the county jail, the punishment originally indicated by the trial court, as proper in this cause. Other contentions have been urged, but in view of the fact that they do not affect the equities of the case, we deem it unnecessary to discuss them.

Accordingly, the order of the Superior court is affirmed as to that part of the order finding respondent guilty of contempt for wilful violation of the injunctive decrees of the court, and reversed as to that part of the order fixing respondent's punishment, and remanded with directions to the Superior court to fix his punishment at imprisonment in the county jail for a period of fifty days.

AFFIRMED IN PART; REVERSED IN
PART AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

orders in the instant case did not permit those orders to be
so affected by his judgment. The maintenance of responsibility and the clarity
of the evidence in the record were sufficient to justify the
order entered in this case finding respondent guilty of contempt
of the orders of the superior court.

The solicitor for respondent on the oral arguments of
the court in this case asserted that the order was proper and
just in the court's judgment and the respondent's proper and
conduct in this case was sufficient to justify the order.

Respondent contends that the punishment imposed by the
court was excessive. As to this contention it is our opinion that
while the flagrancy of the violation of the orders and the respondent's
open defiance of the court's orders were undoubtedly sufficient to
warrant the penalty imposed, under all the circumstances and having
in mind the extensive matters presented to the trial court during
the hearing of this case and the possibility that the respondent
may have been influenced in some degree by them, we feel that the
order of the court will be best served by the imposition of the sentence
of fifty days in the county jail, the punishment originally indicated
by the trial court, as proper in this case. Other contentions have
been urged, but in view of the fact that they do not affect the
verdict of the court, we do not deem it necessary to discuss them.

Accordingly, the order of the superior court is affirmed
as to that part of the order finding respondent guilty of contempt
for willful violation of the injunctive orders of the court, and
reversed as to that part of the order finding respondent's punishment
and remanded with directions to the superior court to fix his punish-
ment at imprisonment in the county jail for a period of fifty days.

LETTERS IN TYPE PRINTED IN
THE COURT REPORTER'S OFFICE

44 7

35829

WILLIAM MILLER and
PETER BORMANN, for use
of MARGARET POLACHEK,
Plaintiffs in Error,

v.

BOWMANVILLE NATIONAL BANK,
a corporation, Garnishee,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

271 I.A. 600⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For a second time this case is before us. By the present writ of error plaintiffs seek to reverse a certain "order" of February 5, 1930, wherein the municipal court entered a judgment in favor of plaintiffs and against the garnishee on its answer for \$61.10; and whersin it appears, upon the garnishee tendering said sum to plaintiffs in satisfaction of the judgment and upon plaintiffs refusing to accept the sum, the court ordered that the garnishee pay the sum to the clerk of the court for plaintiffs' use and, upon its making the payment, discharged it as garnishee.

From a former unpublished opinion filed October 11, 1929 (Miller v. Bowmanville Nat. Bank, 254 Ill. App. 611), the following in substance appeared:

On April 25, 1928, a judgment by confession for \$1184.15 was entered in the municipal court in favor of Margaret Polachek against Miller and Bormann on a judgment note, and garnishment proceedings were instituted against the Bowmanville National Bank and it was served with summons. On May 2, 1928, its default was taken for want of an appearance and a conditional judgment rendered against it as garnishee for \$1184.15. On May 8, 1928, after service of a scire facias, it was again defaulted for want of an

WILLIAM MILLER and
ETHEL MILLER, for use
of MILLER TRADING
COMPANY, Inc.

v.

THE MILLER TRADING
COMPANY, Inc., a
corporation, defendant,
interpleading in error.

271 I.A. 800

THE JUDICIAL COUNCIL HAS THE OPINION OF THE COURT.

For a report that this case is before us. By the present
with of error plaintiff seek to pay the a certain "order" of
February 2, 1933, wherein the defendant sought a judgment
in favor of defendant and against the plaintiff in the amount for
\$20.00; and therein it appears upon the defendant's pleading and
sum to plaintiff in satisfaction of the judgment and upon plain-
tiff refusing to accept the sum, the court ordered that the per-
centage pay the sum to the clerk of the court for plaintiff's use
and, upon the making the payment, directed it to be paid to
from a former unpublished opinion filed October 11, 1933
(Miller v. Knoxville Nat. Bank, 232 Ill. App. 411), the following
is substance reported:
On April 22, 1933, a judgment by confession for \$20.00
was entered in the county court in favor of defendant against
plaintiff and against on a judgment note, and defendant pro-
ceedings were instituted against the Knoxville National Bank and
it was served with process. On May 2, 1933, the defendant was
the sum of \$20.00 and a conditional judgment rendered
against it a judgment for \$20.00. On May 11, 1933, after
service of a notice to appear, it was again returned for want of an

appearance and the conditional judgment was made final. On June 30, 1928, more than 30 days after the rendition of the judgment of May 8, 1928, but only a few days after execution on the judgment had been served upon it whereby it for the first time was informed of the entry of the judgment, the garnishee appeared before the same judge and moved that the judgment be vacated and set aside and that the garnishee be given leave to file an answer. The motion was supported by the verified petition of its assistant cashier (Solt) in the nature of a bill in equity under the provisions of section 21 of the Municipal Court Act. Attached to and made part of the petition were the affidavits of two of its employees (Holys and Heidkamp.) On the same day the court vacated and set aside the judgment; refused to allow plaintiffs to answer the petition; allowed the garnishee to file its answer claiming that it was not indebted in any sum to Miller but that it was indebted to Bernann on a checking account in the sum of \$61.10; and, upon the garnishee tendering the sum to plaintiffs and, upon plaintiffs' refusal of the tender, paying the sum to the clerk of the court, discharged the garnishee.

From the order or judgment of June 30, 1928, plaintiffs sued out the former writ of error, and on October 11, 1929, this court reversed the judgment and remanded the cause with directions. In our former opinion we held that the garnishee's petition and accompanying affidavits disclosed "prima facie" sufficient grounds for setting aside or modifying the judgment against the garnishee of May 8, 1928, under the provisions of section 21 of the Municipal Court Act. But we also held that the court erred in refusing plaintiffs' motion for leave to file an answer to the garnishee's petition, and in not directing a trial to be had on the merits of the issues presented by the petition and answer, and in discharging the garnishee before such a trial had been had. As a reason for

agreement and the conditional judgment was made final. On June 30, 1938, that time after the rendition of the judgment of May 2, 1938, but only a few days after rendition of the judgment had been served upon the attorney it for the first time was informed of the entry of the judgment, the provisions appeared before the same judge and moved that the judgment be vacated and set aside and that the provisions be given leave to file an answer. The motion was supported by the verified petition of its assistant counsel (plaintiff) in the nature of a bill in equity under the provisions of section 11 of the Michigan Court Act. Attached to and made part of the petition were the affidavits of two of its employees (Kilys and Haiskamp). On the same day the court vacated and set aside the judgment; returned to allow plaintiff to answer the petition; allowed the petition to file its answer claiming that it was not involved in any way so that it was not subject to a garnishment on a charging account in the sum of \$1,100; and, upon the court's finding that the sum to plaintiff and upon plaintiff's refusal of the tender, paying the sum to the clerk of the court, discharged the provisions.

From the order of judgment of May 20, 1938, plaintiff filed with the former clerk of court, and on October 13, 1938, this court reversed the judgment and remanded the cause with instructions in her former opinion as well as the provisions' petition and affidavit of plaintiff's assistant counsel (plaintiff) provided for setting aside or modifying the judgment and that the provisions be given leave to file an answer to the provisions' petition, and to set aside the judgment and answer, and to discharge the provisions before such a trial had been had. As a reason for

these last mentioned holdings we stated in substance that the filing of the garnishee's petition constituted "an independent proceeding in the nature of a new suit" and was "not a mere incident to the original suit" (citing, Imbris v. Bear, 230 Ill. App. 155, 158; Izzi v. Lalongo, 248 Ill. App. 90, 93; Central Bond Co. v. Rosser, 323 Ill. 90, 94.) Our directions to the municipal court were "to allow plaintiffs to answer the garnishee's petition and thereafter have a hearing on the merits of said petition and answer."

After our mandate had been filed Margaret Polachek, the beneficial plaintiff, on December 16, 1929, filed in the municipal court a lengthy answer to the garnishee's petition, and during January, 1930, there was a trial without a jury on the issues raised by the petition and answer. For the garnishee bank, Solt, its vice president, and Helys and Heidkamp, its employees, testified at considerable length. Margaret Polachek, who had signed and sworn to the answer was not called as a witness, but her attorney, Maurice L. Davis, who also appears as her counsel in this court, was her principal witness. Another witness for her was one Rubenstein, also an attorney and an office associate of Davis. On February 5, 1930, the court entered the order or judgment, now in question, as first above mentioned. In the order the court found inter alia that the garnishee's petition "is sustained by the proofs."

From the present record and the testimony of the witnesses the following facts in substance appear:

The original garnishee summons was served on the bank on April 26, 1929. It commanded the bank to appear on April 30th in a certain court room in the city hall and make answer, as garnishee, etc. At the opening of court Helys, at Solt's request, then and there appeared for the purpose of making answer, in the bank's behalf, that it was not indebted to Miller in any sum but was indebted to Bormann in the sum of \$61.10. He had with him ledger

sheets of the bank showing these facts. The case was not called and he spoke to the minute clerk about the matter, but did not file any answer for the bank to the interrogatories which had been filed. On May 2nd the court defaulted the bank for want of an appearance, and entered a conditional judgment against it, as garnishee, for \$1184.15. As this is a first class case said conditional judgment was prematurely entered, in violation of rule 10a of the court, which provides that "if a garnishee fails to answer such interrogatories on or before ten days from the date of the service of such notice, together with a copy of said interrogatories, the plaintiff shall be entitled to a conditional judgment and a scire facias against said garnishee." A scire facias was served on the bank on May 3rd, advising it to appear on Monday, May 7th, and show cause, etc. Holys, in behalf of the bank, then and there again appeared with the same papers, again spoke to the minute clerk about the case, and the clerk informed him that the case would be on the call on May 15th. On May 8th, a final judgment was rendered against the bank for \$1184.15. The bank was in no way advised of this action and on May 18th, Holys again appeared in court, and made further inquiries as to the status of the case, but did not get satisfactory replies. On the same day Heidkamp telephoned plaintiffs' attorney (said Davis), asked him for information about the bank making answer and when it should do so and informed him of the trips Holys had made to court and that the bank was only indebted to Bermann in the sum of \$61.10. Davis, concealing the fact that said final judgment of May 8th had been entered, replied that he "did not know when the case was coming up" and that "if the bank wanted to find out that fact it should get an attorney for itself." Davis, while admitting the telephone conversation, testified that he then told Heidkamp of the entry of said final judgment. On cross-examination, however, he stated in substance that he did not cause the execution on said

...of the bank showing these facts. The case was not called
and he spoke to the minute clerk about the matter, but did not
file any answer for the bank to the interrogatories which had been
filed. On May 10th the court denied the bank for want of an
appeal, and entered a conditional judgment against it, as per-
mitted, for \$110,000. This is a first class case said condi-
tional judgment was automatically entered, in violation of rule 15
of the court, which provides that "if a garnishee fails to answer
such interrogatories on or before ten days from the date of the
service of such notice, together with a copy of said interrogatories,
the plaintiff shall be entitled to a conditional judgment and a
judgment against said garnishee." A notice failing was served on
the bank on May 3rd, advising it to appear on Monday, May 7th, and
show cause, etc. Polys, in behalf of the bank, then and there again
appeared with the same papers, again spoke to the minute clerk about
the matter and the clerk informed him that the case would be on the
call on May 10th. On May 8th, a final judgment was rendered against
the bank for \$110,000. The bank was in no way advised of this action
and on May 13th, Polys again appeared in court, and made further
inquiries as to the status of the case, but did not get satisfactory
reply. On the same day defendant telephoned plaintiff's attorney
(said Polys), and told him for information about the bank making answer
and when it would be so and informed him of the original Polys had made
to court and that the bank was only indebted to defendant in the sum
of \$11,000. Again, conceding the fact that said final judgment of
May 8th had been entered, replied that he had not known when the case
was coming up, and that "if the bank wanted to find out what it
should get an attorney for itself." Again, while admitting the
defendant's contention, testified that he then told defendant of the
entry of said final judgment. On cross-examination, however, he
stated in substance that he did not know the execution on said

judgment to be issued and served until more than thirty days after the entry of the judgment, and that this was purposely done, for the reason that "30 days constitutes a term of the municipal court and a judgment could not be vacated, as a rule, after more than 30 days had elapsed." It is apparent, inasmuch as the judgment against the bank of May 3, 1928, is \$1123.05 in excess of any indebtedness it owed to either of the nominal plaintiffs, that if Davis had not concealed from Heidkamp the fact of the entry of said judgment, the bank could at once have appeared before the court and had the judgment vacated or reduced to the true and undisputed amount of its indebtedness to Bormann, viz., \$61.10.

In the case of Izui v. Jalongo, 248 Ill. App. 90, 93, after stating the provisions of section 21 of the Municipal Court Act, and referring to the holdings in Imbrie v. Bear, 230 Ill. App. 155, it is said: "This construction of the statute means that after the expiration of 30 days, judgments of the municipal court may be set aside only by a proceeding essentially similar to proceedings to set aside judgments in courts of equity. The rule in equity, as settled by all the cases is that a diligent defendant who, without negligence or fraud on his part, has been prevented by accident or mistake from presenting a good and meritorious defense to a cause of action may have the judgment entered against him set aside upon making proper application to a court of equity." (Citing How v. Mortell, 28 Ill. 478, 479; Bardonaki v. Bardonaki, 144 Ill. 284, 289; Craig v. Chicago Trust Co., 236 Ill. App. 223, 225.)

In view of the common law record in the present case, the testimony of the witnesses and facts and circumstances in evidence, and considering said section 21 of the municipal court Act and the above cited cases, we are of the opinion that the court did not err in entering its order or judgment of February

5, 1930, and accordingly the same is affirmed.

AFFIRMED.

Sullivan, P. J., and Seanlan, J., concur.

1. 1933, and accordingly the same is attached.

ATTACHED.

Enclaves, No. 1, and Enclaves, No. 2, Enclaves.

36289

45 A

FRED B. TIDD, doing business as
FRED B. TIDD TYPESETTING CO.,
Appellee,

v.

GENERAL PRINTING COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

271 I.A. 601¹

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit commenced on June 28, 1930, for damages for claimed breach of a written contract, there was a trial before a jury in May, 1932, resulting in a verdict in plaintiff's favor for \$9,625.72. On July 15, 1932, judgment was entered upon the verdict against defendant, and the present appeal followed.

Plaintiff's second amended declaration, filed May 26, 1931, consists of 13 special counts and the common counts, to which defendant pleaded the general issue. In each special count a copy of the contract sued upon, dated July 21, 1928, is set forth in full, the material parts of which are as follows:

That the General Printing Company (hereinafter referred to as the Printing Co.) is desirous of having typesetting service on its own premises, and Fred B. Tidd (hereinafter referred to as Tidd) is fully equipped to render such service.

That Tidd shall furnish and deliver two Mergenthaler Linotype machines to the Printing Co.'s premises, with a sufficient number of operators to operate them at capacity if necessary, and keeping the operators upon the machines as may reasonably satisfy the requirements of the Printing Co. for the duration of this contract.

That Tidd shall pay to the Printing Co. the sum of \$32 per month "as rental for the space occupied by the machines, etc. (approximately 400 square feet)," shall keep the operators insured under the Workmen's Compensation Act, and pay for all light and power used by the operators and machines.

That the Printing Co. "agrees to give all of its linotype typesetting work" to Tidd, paying therefor at the following rates: (Here follows a schedule of rates, etc. The rate for 50,100 ems and over is 75 cents per thousand ems for 6-point type and smaller, and 80 cents per thousand ems for 8-point type or larger, and a "linotype rate" is to be "\$4 per hour," and certain mentioned

"time work," etc. is to be charged for.)

That in the event of a "competitive job," a quotation will be made by Tidd "as reasonable as possible," but that "if the Printing Co. can buy at a lower price they may do so without breach of contract."

(Here follow certain provisions as to extra charges, piece rates, and rush work.)

That if, because of rush work or special jobs, "the said two machines in Tidd's opinion are unable to produce the work," then Tidd "shall have the right to turn out the work in his own plant."

That in case of labor troubles, strikes, etc., preventing performance of the contract by Tidd, the Printing Co. shall have the right to retain other typesetting concerns.

That on the first day of each and every month an account shall be stated and balanced between the parties, and all balances paid not later than the 15th day of the month.

That "the duration of this contract shall be five years."

That the above rates for services "shall not include charges for metal delivered," - such metal to be paid for at the rate of 15 cents per pound "and credited to the Printing Co. at 15 cents per pound when returned to Tidd."

That this contract "shall not include proof-reading," but all work delivered by Tidd "shall be of standard quality and done in a good and workmanlike manner."

The preliminary averments of the several special counts are similar. It is averred that by the contract defendant (Printing Co.) "agreed to employ" plaintiff (Tidd) "to do all the linotype typesetting work" required by defendant in the conduct of its business on its premises at 351-363 East Ohio Street, Chicago, for a period of 5 years, at the rates mentioned; that plaintiff agreed "to furnish, deliver and install in the premises allotted to him in defendant's plant" the two mentioned Mergenthaler linotype machines, and employ a sufficient number of operators to operate the machines at capacity if necessary, keeping such operators upon the machines as may reasonably satisfy the requirements of defendant during the duration of the contract; that "plaintiff was to be given an opportunity to bid on certain work, specified in the contract as 'competitive jobs,' and that defendant was to give to plaintiff the linotype typesetting on all of said 'competitive jobs' on which his bid was lowest;" that an accounting between the parties and payment of balance was to be made each month; that pursuant to the contract plaintiff did furnish, deliver and install the two machines in defendant's premises in the

space allotted to him, and in addition valuable tools, equipment and supplies, and did employ and maintain a sufficient number of operators to operate the machines and equipment at capacity, etc., and did pay the required rent for the allotted space, etc., and did in all other respects comply with the terms and provisions of the contract to be by him performed, and is still ready, able and willing so to do.

The first count charges that, in violation of the provisions of the contract, defendant, "though having a great amount of linotype typesetting work and work specified as 'competitive jobs,'" has attempted, without any reasonable cause to revoke and terminate the contract, in that "it has refused and failed to give all of its linotype typesetting work to plaintiff and has given the same to others;" and that by reason of its breaches of the contract plaintiff has suffered damages (a) on account of moneys remaining unpaid for work and labor performed, (b) on account of the two machines, together with the tools, equipment and supplies so furnished, (c) on account "of deprivation of gains, profits and emoluments which otherwise he would have had and obtained under the contract," and (d) on account of "great expense." The ad damnum is \$50,000.

The claimed breaches of the contract as assigned in the remaining 12 special counts are respectively:

2. That defendant "has neglected and refused to permit plaintiff to bid on said competitive jobs, and has continued to take bids and let contracts for linotype typesetting work and competitive jobs to others, without plaintiff's knowledge and without giving him an opportunity to bid on the same."

3. That defendant "has failed to pay plaintiff for work done and is now indebted to him for such work, in addition to other charges herein claimed, in the sum of \$4,000."

4. That defendant "has wholly failed and refused to hold an accounting as provided by the contract."

5. That defendant "did interfere with the use, occupation and possession by plaintiff of the space allotted to him under the contract, whereby he was compelled to relinquish possession of said space."

6. That defendant, "on December 31, 1929, ceased giving any

linotype typesetting work, or work known in the contract as 'competitive jobs,' to plaintiff, without his consent and without any fault on his part, but gave said work to others in violation of the contract."

7. That defendant "has failed and refused, and still fails and refuses, to employ plaintiff as provided by the contract;" that the machinery and equipment were installed "at great expense;" and that because of defendant's refusal to employ plaintiff, "he has lost the cost of transportation, installation and maintenance of said machinery and equipment."

8. That defendant "has failed and refused to pay to plaintiff for metal delivered in conformance with the contract."

9. That defendant "has failed and refused to return to plaintiff the machinery, tools, equipment, type metal and supplies delivered to defendant by him on the premises allotted to him."

10. That defendant, in violation of the contract, "failed and refused to give all of its linotype typesetting work to plaintiff," and gave and continued to give "more and more of such work to others," at times when plaintiff was ready, willing and able, as he is still, to do such work "in a good and workmanlike manner and at a lower price than any other person, firm or corporation," whereby "large gains and profits" were lost to plaintiff.

11. (This count is similar to the 10th, and charges that in violation of the contract defendant "gave and continued to give, gradually more and more linotype typesetting work, referred to in the contract as 'competitive jobs,' to others," whereby plaintiff suffered "great detriment and loss.")

12. That defendant, in violation of the contract, "dispensed with plaintiff's services and employed others to perform such services without his knowledge or consent," to his "great detriment and loss."

13. (This count is similar to the 11th, and charges that defendant, "without plaintiff's knowledge and without giving him an opportunity to bid," took and continued to take bids from others on the class of work referred to in the contract as "competitive jobs.")

On July 27, 1931, upon defendant's motion and the court's order, plaintiff filed a bill of particulars in substance as follows:

- | | |
|--|--------------|
| 1. Balance due on account, February 28, 1930, for merchandise sold and delivered by plaintiff to defendant, | \$3,023.72 |
| 2. January 15, 1930, on an account stated for merchandise so sold and delivered, | 3,023.72 |
| 3. Work, labor and materials | (No figures) |
| 4. <u>Depreciation</u> on installed equipment, consisting of proof-press, mitering machine, cutters, type, type cases, etc., "which damage for depreciation is claimed by reason of defendant's failure to comply with the contract, or to permit plaintiff from complying with his part thereof," | 9,500.00 |
| 5. <u>Depreciation</u> on two Mergenthaler Linotype Machines, for reasons stated above. | 7,050.00 |

linotype typesetting work, or work known in the contract as 'competitive jobs', to plaintiff, without his consent and without any limit on his part, but gave said work to others in violation of the contract.

7. That defendant "has failed and refused, and still fails and refuses, to employ plaintiff as provided by the contract;" that the machinery and equipment were installed "at great expense;" and that because of defendant's refusal to employ plaintiff, he has lost the cost of transportation, installation and maintenance of said machinery and equipment."

8. That defendant "has failed and refused to return to plaintiff for metal delivered in compliance with the contract."

9. That defendant "has failed and refused to return to plaintiff the machinery, tools, equipment, type metal and supplies delivered to defendant by him on the premises allotted to him."

10. That defendant, in violation of the contract, "failed and refused to give all of his linotype typesetting work to plaintiff;" and gave and continued to give "more and more of such work to others," at times when plaintiff was ready, willing and able, as he is still, to do such work "in a good and workmanlike manner and at a lower price than any other person, firm or corporation," thereby "losing gains and profits" were lost to plaintiff.

11. (This count is similar to the 10th, and charges that in violation of the contract, defendant "gave and continued to give, gradually more and more linotype typesetting work, referred to in the contract as 'competitive jobs', to others," whereby plaintiff suffered "great detriment and loss.")

12. That defendant, in violation of the contract, "interfered with plaintiff's services and employed others to perform such services without his knowledge or consent," to his "great detriment and loss."

13. (This count is similar to the 11th, and charges that defendant, "without plaintiff's knowledge and without giving him an opportunity to bid," took and continued to take bids from others on the class of work referred to in the contract as "competitive jobs.")

On July 27, 1931, upon defendant's motion and the court's

order, plaintiff filed a bill of particulars in substance as follows:

1. Balance due on account, February 28, 1930, for merchandise sold and delivered by plaintiff to defendant, \$2,053.72

2. January 11, 1930, on an account stated for merchandise so sold and delivered, 1,053.72

3. July, 1930, and merchandise (no figures)

4. Depreciation on installed equipment, consisting of proof-press, mixing machine, galleys, type cases, etc., "which were for depreciation is claimed by reason of defendant's failure to comply with the contract, or to permit plaintiff from negotiating with his said partner."

5. Depreciation on two linotype machines, for reasons stated above. 1,050.00

6. Plaintiff's loss sustained during period commencing in July, 1928, and "up to date of trial," by reason of "defendant's failure to give all work on orders received by it from its customers, averaging about \$1500 per month." (No figures)

7. Damages suffered by plaintiff in not receiving work on orders for which there were competitive bids, occasioned by "defendant's failure and refusal to request of or accept bids from plaintiff, in violation of the contract." (No figures)

8. Damage, from July, 1928, to March, 1930, "caused by payment of salary and wages to plaintiff's employees, hired by him to perform work under the contract, but which work defendant refused and failed to give to plaintiff, in violation of the contract." (No figures)

9. "Tools, implements, materials and type," belonging to plaintiff, but "taken and appropriated by defendant," while they were in the space allotted to plaintiff in defendant's premises. 900.00

10. Damage to machinery and fixtures, belonging to plaintiff, "by or through the acts of defendant or its agents." 150.00

11. Cost of removal of machines, tools, implements, merchandise, etc., "necessitated by defendant's violations of the contract." 550.00

12. Loss of profits that plaintiff "would have made, had defendant complied with the terms of the contract to give all of its work to plaintiff as required thereby," from "July, 1928, to March, 1930, and also from June, 1928 to July 25, 1931." 16,500.00

13. Prospective damages from date of trial to July, 1933 (expiration of contract) by reason of defendant's "failure and refusal to give its work to plaintiff as required by contract." (No figures)

14. Work, labor and materials furnished by plaintiff and not paid for by defendant (No figures)

The bill of exceptions, showing the proceedings on the trial, is very voluminous. Plaintiff was the principal witness called in his behalf. Nine other witnesses testified for him and there was also introduced by him a mass of writings, consisting of ledger sheets and memoranda taken from his books, checks, invoices, job tickets, time books, etc. Six witnesses testified for defendant, - the principal ones being William N. Lane and J. Walker Black, both officers of defendant and active in its business affairs.

... Plaintiff's last assigned working period
commencing in July, 1933, and up to date of trial, by
reason of "defendant's failure to give all work on
a case received by it from its customers, exhibiting
about 1933 per month."

(in figures)

V. Plaintiff's failure to give all work on
a case received by it from its customers, exhibiting
about 1933 per month, by Plaintiff in not
receiving work on orders for which there were
sufficient funds, as evidenced by "defendant's failure
and refusal to request of or accept from plain-
tiff, in violation of the contract."

(in figures)

6. Plaintiff, from July, 1933, to March, 1934,
"caused by payment of salary and wages to Plaintiff's
employees, from July, 1933, to March, 1934, the con-
tract, but which work defendant refused and failed to
give to Plaintiff, in violation of the contract."

(in figures)

7. "Tools, implements, materials and types,
belonging to Plaintiff, but 'looted and appropriated
by defendant,' which they were in fact allowed
to Plaintiff in defendant's possession."

900.00

10. "Tools, implements, materials and types, be-
longing to Plaintiff, but 'looted and appropriated
by defendant, in violation of the contract."

150.00

11. "Tools, implements, materials and types, be-
longing to Plaintiff, but 'looted and appropriated
by defendant, in violation of the contract."

150.00

12. "Tools, implements, materials and types, be-
longing to Plaintiff, but 'looted and appropriated
by defendant, in violation of the contract."

15,000.00

13. "Tools, implements, materials and types, be-
longing to Plaintiff, but 'looted and appropriated
by defendant, in violation of the contract."

(in figures)

14. "Tools, implements, materials and types, be-
longing to Plaintiff, but 'looted and appropriated
by defendant, in violation of the contract."

(in figures)

The bill of exceptions, showing the proceedings on the
trial, is very voluminous. Plaintiff was the principal witness
called to the stand. The other witnesses testified for him
and there was also introduced by him a mass of writings, consisting
of legal sheets and memoranda, taken from his books, books, in-
voice, job tickets, time books, etc. In addition testified for
defendant, - the principal ones being William M. Lane and J. Walker
Black, both officers of defendant and active in the business affairs.

Other instruments and writings were introduced in evidence by it.

As we have reached the conclusion (after reviewing the evidence as well as the lengthy briefs and arguments of opposing counsel) that the judgment should be reversed and the cause remanded for another trial, we shall refrain from a detailed discussion of the evidence. The following facts, however, may be mentioned: Plaintiff had been in the typesetting business for several years on South Dearborn street, Chicago, and defendant in the printing business on East Ohio street. After the execution of the contract in July, 1928, plaintiff moved the two linotype machines and equipment from his main plant and installed them in the space assigned in defendant's plant. Plaintiff in effect there established a branch plant. Thereafter plaintiff did considerable work for defendant under the contract and for a time the business relations were satisfactory and harmonious. At the beginning defendant turned over certain linotype typesetting work, being done under existing contracts with publishers of certain magazines. Thereafter most of the work done by plaintiff was on competitive jobs. Although the contract did not include proof-reading by plaintiff, in the spring of 1929, the parties agreed that thereafter plaintiff would pay one-half of a proof-reader's salary. In the fall of 1929, and winter of 1929-30, complaints were made of certain delays in plaintiff's work and disputes arose between the parties as to the amount of work that plaintiff was receiving under the contract, the business relations between the parties became strained, and, finally, during May or June, 1930, plaintiff removed his two machines and all equipment from defendant's plant, and on June 28, 1930, commenced the present action.

It is apparent from plaintiff's bill of particulars that his principal claim for damages (aside from his extraordinary

other testimony and exhibits were introduced in evidence by 12. a we have reached the conclusion (after reviewing the evidence as well as the lengthy briefs and statements of opposing counsel) that the judgment should be reversed and the cause remanded for another trial, we shall return from a recessed discussion of the evidence. The following facts, however, may be mentioned: Plaintiff had been in the operating business for several years on South Main Street, Chicago, and defendant in the printing business on West Main Street. From the operation of the contract in 1919, 1920, Plaintiff owned the two Linotype machines and equipment from his main plant and installed them in the space assigned in defendant's plant. Plaintiff in effect then established a branch plant. Thereafter Plaintiff did considerable work for defendant under the contract and for a time the business relations were social story and harmonious. At the beginning defendant turned over certain Linotype typesetting work to Plaintiff. Plaintiff contracted with publishers of certain magazines. Thereafter most of the work done by Plaintiff was on competitive jobs. Although the contract did not include proof-reading by Plaintiff, in the spring of 1927, the parties agreed that thereafter Plaintiff would pay one-half of a proof-reader's salary. In the fall of 1927, and winter of 1928-29, complaints were made of certain delays in Plaintiff's work and disputes arose between the parties as to the amount of work that Plaintiff was receiving under the contract. The business relations between the parties became strained, and finally, during May or June, 1929, Plaintiff removed his two machines and all equipment from defendant's plant, and on June 29, 1930, commenced the present action. It is apparent from Plaintiff's bill of particulars that his principal claim for damages (other than his immediately

and excessive claims of depreciation to the two machines and equipment, aggregating \$16,550, which are not sustained by competent evidence) is the loss of the profits that he "would have made" had there been a full compliance with the contract by defendant. And it is apparent from plaintiff's evidence that he relied mainly on the trial for a recovery upon said claim of "loss of profits." And it is apparent, considering the entire evidence, that the jury's verdict of \$9,623.72, is largely made up of an award for such claimed lost profits." And the main ground urged by defendant's counsel for a reversal of the judgment is that it "is not sufficiently supported by evidence constituting a proper basis for awarding damages for loss of profits. We agree with the contention. Plaintiff's evidence on that issue is too speculative, uncertain and conjectural. And what is said in the opinion in Central Coal & Coke Co. v. Hartman, 111 Fed. Rep. 96, 98-9, is here particularly applicable, viz., (*italics ours*):

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss. (*Citing cases.*) There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. * * He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. (*Citing cases.*) And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income

and therefore claim of depreciation as the two machines and
equipment, cost \$12,000, which are not included by
complaint (v. 100) as the loss of the profits in the "would
have made" had there been a full compliance with the contract by
defendant. And in its opinion from Plaintiff's evidence that he
relied mainly on the trial for a recovery upon said claim of "loss
of profits." And it is apparent, considering the entire evidence,
that the jury's verdict of \$12,000.00, is largely made up of an award
for each claim for "profits." And the main ground urged by
defendant's counsel for a reversal of the judgment is that it is
not sufficiently supported by evidence constituting a proper basis
for awarding damages for loss of profits. He agrees with the com-
mission. Plaintiff's evidence on this issue is too speculative,
uncertain and conjectural. And what is said in the opinion in
United Coal & Coke Co. v. Gorman, 111 Ky. Rep. 91, 98-9, is here
repeatedly applicable to the (Plaintiff's case).

of the business for a reasonable length of time, before as well as during the interruption, is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, - uncertain and incapable of recovery. (Citing cases.)"

No such evidence or proof, as last mentioned in said opinion, appears in the present record. And the principles above enunciated are in accord with the holdings and decisions of the courts of review of this State. (Green v. Williams, 45 Ill. 206, 209; Chapman v. Kirby, 49 Ill. 211, 219; Landis v. Wolf, 206 Ill. 392, 399; Illinois, etc. R. Co. v. Decker, 3 Ill. App. 135, 140; Podlaski v. Bender, 150 Ill. App. 312, 315.)

And we are of the opinion that there is substantial merit in defendant's counsels' further contention that much of the documentary evidence offered by plaintiff and admitted over defendant's objections was erroneously admitted, for the reasons that no proper foundation for its admission was laid, that it was immaterial to the issues as presented by the pleadings and that its introduction was calculated to, and evidently did, confuse the jury.

Defendant's counsel also contend that several given instructions, offered by plaintiff, were erroneous and prejudicial. We agree with the contention. No useful purpose will be served, however, in a detailed discussion of the instructions.

During the trial plaintiff introduced evidence tending to show that defendant was indebted to him, for merchandise sold and delivered and not paid for by defendant, in the sum of \$3023.72, as stated in the bill of particulars. But as against this sum defendant's evidence tended to show that plaintiff was indebted to it for many thousand pounds of metal, tendered to him and which he refused to receive. By one of the provisions of the contract this metal was first to be paid for by defendant at 15 cents per pound, and later, when it was returned to plaintiff, defendant was to be credited on the running account for the metal at the same amount per pound. From the evidence we cannot determine with any accuracy

of the business for a reasonable length of time, before as well as during the investigation, is in no better situation, in the hands of such person, than it is in the hands of a thief, or a person who has been convicted of larceny. (Citing cases.)

As to the evidence of guilt, as last mentioned in said opinion, appears in the present record. And the principles above enunciated are in accord with the holdings and decisions of the courts of review of this State. (Citing cases.)

209; Johnson v. Allyn, 44 Ill. 211, 1871; Smith v. Wolf, 188 Ill. 373, 302; Illinois, etc. v. Leach, 3 Ill. 404, 183; 140; Leach v. Leach, 180 Ill. 411, 1871; 188, 313.)

And we are of the opinion that there is substantial merit in defendant's contention, in this contention that much of the defendant's evidence offered by plaintiff and admitted even defendant's objections are erroneously admitted, for the reasons that no proper foundation for the admission was laid, that it was immaterial to the issues as presented by the pleadings and that the introduction was calculated to, and actually did, confuse the jury.

Defendant's counsel also contend that several given in-
structions, offered by plaintiff, were erroneous and prejudicial.
We agree with the contention. No useful purpose will be served, however, in a detailed discussion of the instructions.

During the trial plaintiff introduced evidence tending to show that defendant was indebted to him, to defendant's wife and delivered and not paid for by defendant, in the sum of \$100.75. As stated in the bill of particulars. But as against this sum defendant's evidence tended to show that plaintiff was indebted to him for many thousands of dollars, tending to him and which he refused to receive. By one of the provisions of the contract this sum was first to be paid for by defendant as in writing per bond, and later, when it was returned to plaintiff, defendant was to be credited on the running account for the total of the same amount. From the evidence we cannot determine with any accuracy

what is the net and proper indebtedness of defendant to plaintiff.

In item 9 (\$900) of the bill of particulars the claim is made of certain tools, etc., "taken and appropriated by defendant." Plaintiff's evidence of the claimed appropriation by defendant is uncertain and unsatisfactory. Furthermore, such a claim as an element of damage is not made in the declaration. The purpose of requiring a bill of particulars is to limit a claimant upon the trial, (Colby v. Wilson, 320 Ill. 416, 420,) but such bill cannot be used to enlarge the claim as set up in the declaration (49 Corpus Juris, p. 629, sec. 894; Offner v. Wilke, 208 Ill. App. 463, 464.) And we do not find sufficient evidence in the record to warrant any recovery by plaintiff for the damages as claimed in items 10 and 11 of the bill of particulars.

For the reasons indicated the judgment of the superior court of July 13, 1932, appealed from, is reversed and the cause is remanded.

REVERSED AND REMANDED.

~~XX~~
Sullivan, P. J., and Scanlan, J., concur.

36443

GERTRUDE La POOK,
Appellee,

v.

CHARLES SINCERE et al.,
doing business as Charles
Sincere & Co.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 601²

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced on January 7, 1932, there was a trial without a jury in September, 1932, resulting in a finding and judgment against defendants for \$451.65, and the present appeal followed.

In plaintiff's amended statement of claim she alleged that during the year 1928, and thereafter, defendants were in business in Chicago as stock brokers, and plaintiff bought and sold various stocks through them and had a running account with them; that on November 23, 1928, she paid to them the sum of \$450 and received a receipt or credit memorandum (partly printed and partly in pencil handwriting) as follows:

"CHARLES SINCERE & CO.
Chicago,

NO. 17877
11 -23, 1928

Gertrude LaPook,

We credit your stock account
Check
Four Hundred and Fifty

\$450.00

Yours very truly,
CHARLES SINCERE & CO.
Per M. Barder."

that defendants credited the sum to her on said account but also charged her account with a like sum; that the charge was made wrongfully, in that defendants did not pay said sum to her, nor did they expend the same for her use and benefit; that the wrongful

CHARLES J. ROSE, Appellee.

7.

CHARLES J. ROSE et al.,
being business as Charles
Rose & Co.,
Appellants.

ALFRED H. ROSE, Appellant.

COURT OF CHICAGO.

281 A.A. 601

MR. JUSTICE DELANEY delivered the opinion of the court.

In a civil action in equity, commenced on January 7, 1932, there was a trial without a jury in September, 1932, resulting in a finding and judgment against defendants for \$25.00, and the present appeal followed.

In plaintiff's amended statement of claim she alleged

that during the year 1928, and thereafter, defendants were in business in Chicago as stock brokers, and plaintiff bought and sold various stocks through them and had a running account with them; that on November 22, 1928, she paid to them the sum of \$50 and received a receipt or credit memorandum (partly printed and partly in pencil handwriting) as follows:

"CASH ON HAND \$ 50.
Chicago, Ill. 11 - 22, 1928
NO. 17377

Charles J. Rose,

To credit your stock account
Check
Four Hundred and Fifty
Yours very truly,
CHARLES J. ROSE & CO.,
By E. J. Barker."

That defendant credited the sum to her on a 10 account she also charged her account with a like sum; that the charge was made wrongfully, in that defendant did not pay said sum to her, nor did they expend the same for her use and benefit; that the wrongful

charge was never corrected; that on June 30, 1930, and on occasions thereafter, she received from defendants, through their auditors, a statement showing a credit of \$1.65, only, due to her; and that in fact there is now due to her from defendants, in addition to said \$1.65, the sum of \$450, or a total of \$451.65, with interest.

Defendants, in their affidavit of merits by their attorney, who afterward acted as such upon the trial, admitted that as stock brokers they from time to time had purchased and sold various stocks for plaintiff. They alleged that on or about November 23, 1928, "plaintiff did not pay to defendants the sum of \$450;" that at that time "defendants executed and delivered a check to plaintiff for \$450, and on the same day plaintiff returned and redelivered the check to defendants, thus constituting a 'wash transaction,' i.e., a debit and credit on her account covering the same item and the same check;" that "consequently a charge of \$450 was made against plaintiff on said account when the check was issued and delivered to her, and a corresponding credit was given to her upon ^{her} delivery of the check to defendants;" that the debit and credit items were made upon defendants records and upon a statement issued to her on December 1, 1928, and upon every date thereafter when statements were issued; and that plaintiff "did not at any time deliver \$450, in cash or check or in any other form, other than to receive credit upon the return of said check for \$450, issued on November 23, 1928."

On the trial plaintiff testified at considerable length. Her brother, Elton La Peek also testified for her, and she introduced in evidence numerous writings. Defendants called five witnesses, - all employees of defendants, including Michael Barder, their assistant cashier, who signed said receipt. Defendants also introduced certain other writings, consisting of ledger sheets, cash sheets, a duplicate receipt book, a book of check stubs and defendants' original check, No. 24279, for \$450, dated November 24, 1928 (one day after the date

on the way never corrected; that on June 30, 1933, and on October 31, 1933, the balance sheet showed a credit of \$1.00, only, and so that in fact there is now due to her from defendant, in addition to said \$1.00, the sum of \$1.00, or a total of \$2.00, with interest.

Defendant, in their affidavit of service by their attorney, who otherwise stated no more upon the trial, admitted that as stock brokers they from time to time had purchased and sold various stocks for plaintiff. They alleged that on or about November 30, 1933, "plaintiff did not pay to defendant the sum of \$2.00; that at that time "defendant executed and delivered a check to plaintiff for \$2.00, and on the same day plaintiff returned and redelivered the check to defendant, thus constituting a 'round-trip check', i.e., a debit and credit on her account covering the same item and the same check; that "consequently a check of \$2.00 was made against plaintiff on said account when the check was issued and delivered to her, and a corresponding credit was given to her upon delivery of the check to defendant; that the debit and credit there was made upon defendant's records and upon a statement issued to her on November 1, 1933, and upon every date thereafter when statements were issued; and that plaintiff "did not at any time deliver said check or check or in any other form, either then or before credit upon the return of said check for \$2.00, issued on November 30, 1933."

On the trial plaintiff testified as hereinbefore stated. Her brother, John La Rock also testified for her, and she introduced in evidence numerous affidavits. Defendant called five witnesses, all employees of defendant, including Michael Brown, their assistant cashier, who signed said receipt. Defendant also introduced certain other affidavits, including of Edgar Smith, John Brown, a duplicate receipt book, a book of cash and defendant's original check, No. 2487, for \$2.00 dated November 24, 1933 (one day after the date

of said receipt), payable to the order of plaintiff, and drawn on the First National Bank, Chicago. There is no endorsement by plaintiff on the check, but there is a rubber stamp endorsement as follows: "Pay to First National Bank, Chicago, or order, (signed) Charles Sincere & Co." Perforated through the check are the words and figures "Paid 11-24-28."

Plaintiff testified that she was connected with La Pook and Sons, stationery makers, located at 220 S. State street, Chicago; that she opened a personal stock trading account with defendants in August, 1928, and dealt with them thereafter until about May 1, 1930, buying and selling stock; that from time to time she received itemized statements of the condition of her account; that she originally opened the account by telephone; that she was requested to sign a written application and bring it into defendants' office; that she did not go to the office but mailed the application, with some money, to defendants; that thereafter she commenced her stock transactions with defendants and continued them at intervals; that most of the transactions were conducted through the mails; that on those occasions when she would be required to deposit checks or cash at defendants' office she did not personally go to the office but "always sent somebody else there;" that on November 23, 1928, she sent two "cashier's checks" to defendants' office, payable to defendants' order, for \$500 and \$450 respectively; that she sent them by "a girl that was working for us," and that the girl brought back the two receipts to her; that she does not remember who the girl was; that the payments on that day to defendants aggregated \$950; that she did not at the time have a personal checking account with any bank; that she borrowed the moneys from a Chicago bank, putting up collateral for the loans and procuring "a cashier's check from some bank;" that she does not remember the name of the bank from which she got the \$450 cashier's check; and that she "has not attempted to inquire" where she got the \$450 check. (The two original receipts were intro-

it was receipt), payable to the order of Plaintiff, and drawn on the First National Bank, Chicago. There is no endorsement by Plaintiff on the check, but there is a rubber stamp endorsement as follows: "Pay to First National Bank, Chicago, or order, (signed) Charles Henry B. Co." written across the top of the check and it was dated 11-14-33.

Plaintiff testified that she was conversed with in Cook and was, allegedly, located at 221 N. State Street, Chicago. That she opened a personal check trading account with defendant in August, 1932, and dealt with them thereafter until about May 1, 1934, during and selling stock; that from time to time she received itemized statements of the condition of her account; that she originally opened the account by depositing cash and was required to sign a written application and bring it into defendant's office; that she did not go to the office but mailed the application, with some money, to defendant; that thereafter she continued her stock transactions with defendant and continued them at intervals; that most of the transactions were conducted through the mail; that on those occasions when she would be required to deposit checks or cash at defendant's office she did not personally go to the office but always sent somebody else there; that on November 2, 1934, she sent two "cashier's checks" to defendant's office, payable to defendant's order, for \$25 and \$10 respectively; that she had them by a girl that was working for her; that the girl should have been responsible to have them sent to defendant and the girl sent them to defendant on that day to defendant's satisfaction; that she did not at the time have a personal checking account with any bank; that she borrowed the money from a Chicago bank, paying up collateral for the loan and providing "a cashier's check from some bank"; that she does not remember the name of the bank from which she got the \$350 cashier's check; and that the "cash not advanced" as is stated there she got the \$350 check. The two original receipts were introduced

duced in evidence. The one for \$500 is numbered 17875, and is like the other for \$450, which is set forth above, is also dated "11-23-28" and is also signed, in defendants' name "per M. Barder." There is no dispute over the receipt of the \$500 check.)

Plaintiff further testified that early in December, 1928, after receiving a monthly statement of account from defendants, she noticed a debit charge against her of \$450, as of November 24, 1928; that she thereafter telephoned defendants' office, got into communication with its "bookkeeper" and objected to the charge; that he said he "would look into it" and advise her; and that not hearing further from defendants, she, on February 13, 1929, wrote a letter to them about the matter. This original letter was produced by defendants, was introduced in evidence by her and is contained in the present record. It is on the letter-head of "La Pook & Sons," is dated February 13, 1929, is signed by plaintiff and addressed to defendants for the "attention of Mr. Gaffney," and is as follows:

"I phoned about three weeks ago, after checking up my statements, and the party to whom I talked said he would call me back as soon as he had a report for me. To date, I haven't heard, and so phoned again and received the information to write to Mr. Gaffney.

On my November 30th statement I am credited with deposit of \$500, paid on November 24th, - also \$450 paid the same date. Then I am charged with withdrawing the \$450, which I have never done. I have not withdrawn any money from my account at any time.

I am holding receipts of \$450 and \$500, signed by 'Barder' (I think the name is.) The date of the receipts is November 23rd. I was asked to put up this additional money when the market dropped and in order to buy additional stock.

Will you please investigate this for me, and see if you can't get it adjusted. * *"

Plaintiff further testified that she received from defendants a reply to her letter. It was introduced in evidence, is on the letter-head of defendants, is dated February 14, 1929, is addressed to her, is signed in ink "Chas. Sincere & Co." and is as follows:

"In answer to yours of the 13th, a check for \$450 was charged to your account in error and we have since credited it back in your account. Trusting this is satisfactory, and awaiting your further pleasure, we are, etc."

Plaintiff further testified that after this correspondence

signed in view now. The one for \$50 is numbered 1480, and is like the other for \$50, which is as shown above, is also dated "11-22-32" and is also signed, in defendant's name "per M. Barker". There is no dispute over the receipt of the \$50 check.

Defendant further testified that early in December, 1932, after receiving a monthly statement of account from defendant, she noticed a debit charge against her of \$450, as of November 24, 1932; that she thereafter telephoned defendant's office, got into conversation with the "bookkeeper" and objected to the charge; that he said he "would look into it" and advised her; and that not hearing further from defendant, she, on February 13, 1933, wrote a letter to them about the matter. This original letter was produced by defendant, was introduced in evidence by her and is contained in the present record. It is on the letter-head of "The Book Store", is dated February 13, 1933, is signed by plaintiff and addressed to defendant for the "attention of Mr. Galtney", and is as follows:

"I phoned about three weeks ago, after checking up my statements, and the party to whom I talked said he would call me back as soon as he had a report for me. To date, I haven't heard, and so phoned again and received the information as to Mr. Galtney.

On my November 30th statement I am credited with deposit of \$500, paid on November 24th, - also has paid the same date. Then I am charged with withdrawing the \$450, which I have never done. I have not withdrawn any money from my account at any time. I am holding receipts of \$450 and \$500, signed by 'Barker'. (I think the name is.). The date of the receipt is November 24th. I was asked to put up this additional money when the market dropped and in order to pay additional account. Will you please investigate this for me, and see if you can't get it adjusted." "

Defendant further testified that she received from defendant a reply to her letter. It was introduced in evidence, is on the letter-head of defendant, is dated February 14, 1933, is addressed to her, is signed in ink "Galtney, Harvey & Co.", and is as follows:

"In answer to yours of the 13th, a check for \$450 was placed to your account in 1932 and so have simply credited it back in your account. Regarding this is correct copy, and enclosing your letter please, we are, etc."

Defendant further testified that after this correspondence

she continued to trade with defendants, and received several statements from them as to her accounts; that in these statements she noticed that said debit charge of \$450 had not been credited back to her; that thereafter she telephoned defendants' office but the matter was not adjusted; that she did not herself call at defendants' office but directed her brother, Elton La Pook, to call there; that he did so and reported to her the details of the interview; that during February, 1930, under date of February 11, 1930, she received an itemized statement of her account from August 3, 1928, to January 31, 1930, showing a claimed balance due from her to defendants on January 31, 1930, of \$79.23. (This statement was introduced in evidence by her. It shows numerous debit and credit items during the period. Under date of November 24, 1928, are two credit items of "deposits," of \$450 and \$500, respectively, and a debit charge for "check" of \$450. At no subsequent place in the account is there any credit made as against said charge.) Plaintiff further testified that the only time she ever personally was in defendants' office was in October, 1929, when she made a deposit of about \$700, which was credited to her account (it appears as a credit on said statement); that she then met Gaffney for the first time and had a conversation with him; that she ceased trading with defendants in November, 1929; and that under date of May 31, 1930, she received her last statement of account from defendants, showing a credit of \$1.65 due to her. (This statement was introduced in evidence by her.)

Elton La Pook (plaintiff's brother) testified in substance that during the year 1929, and about six months after February 13, 1929, he several times called at defendants' office and talked with a representative, named "Monty," about plaintiff's account and her claim that she had been erroneously charged with a debit of \$450; that Monty at first said "there was nothing to straighten out as it was strictly a clerical error;" that he afterward said that

the defendant to trade with defendant, and received several notes from him at the defendant's place in these statements the defendant said that he had not been credited back to him; that the defendant had withdrawn defendant's office but the matter was not adjusted; that he did not have call at defendant's office but directed her brother, Alton La Bock, to call there; that he did not report to her the details of the interviews that during February, 1935, under date of February 11, 1935, she received an itemized statement of her account from August 8, 1933, to January 31, 1935, showing a claimed balance due from him to defendant on January 31, 1935, of \$78.25. (This statement was introduced in evidence by her. It shows numerous debit and credit items during the period. Under date of November 24, 1933, are two credit items of "deposits" of \$45 and \$50, respectively, and a debit of \$10 for "check" of \$45. At no subsequent place in the account is there any credit and no amount paid charges.) Plaintiff further testified that the only time she ever personally was in defendant's office was in October, 1933, when she made a deposit of about \$75, which was credited to her account (it appears on record on said statement); that she then met Alton La Bock for the first time and had a conversation with him; that she ceased trading with defendant in November, 1933; and that under date of May 31, 1935, she received her last statement of account from defendant, showing a credit of \$1.55 due to her. (This statement was introduced in evidence by her.) Alton La Bock (Plaintiff's brother) testified in substance that during the year 1933, and there are months after February 11, 1935, he never had time called at defendant's office and talked with a representative, named "Moe", "Dont Plaintiff's account and that claim that she had been erroneously charged with a credit of \$45; that Moe of this said "Moe" was working as a salesman and as is was entirely a clerical error; that he further said that

defendants "had made a charge in error and then credited her account to offset it;" that upon the witness saying "if that was the case, his sister would not have a receipt for the payment of \$450," Hosty replied that "she would not, but she has no such receipt;" that the witness replied that she had such a receipt and that he would bring it in; that a day or two later he again called on Hosty and showed him a photostatic copy of the receipt; that Hosty then said that "she has no money coming; she deposited \$450, and then went right over to the cashier's window and withdrew it; she has got her money;" that thereupon the witness inquired if defendants had any writing showing that plaintiff had received the \$450; that Hosty replied that they had and suggested that the witness call again and he would be shown the writing; that at his subsequent call Hosty showed him defendants' check for \$450, No. 24279, dated November 24, 1928, payable to plaintiff's order. (This is the same check mentioned above and which is not endorsed by plaintiff, or by anyone for her in her name.) The witness further testified on cross-examination: "Hosty said the first time it was a clerical error; he said the next time that she paid the money in one window and withdrew it at the next window; he made two different statements."

For defendants no witness by the name of Hosty testified. Defendants' five witnesses were McHale (margin clerk), Perkins (assistant cashier), Barder (assistant cashier and who signed said two receipts for \$500 and \$450 respectively), Bradley (cashier) and Gaffney (bookkeeper.)

McHale testified that in November, 1928, he was defendants' "margin clerk on her account;" that about November 23, 1928, the "only margin needed on her account was about \$50 or \$75," and "we sent her a margin call," as was the custom; that he never saw the cashier's checks for \$500 and \$450, which plaintiff claimed she deposited on November 23rd; that on that day "there was a slip sent to me from Perkins' (cashier's) department, about "half a block

defendant "had made a charge in error and then corrected it." (p. 100)
 "I said: 'I am not sure, but I think it is the same.'"
 The witness would not have a receipt for the payment of \$100.00. He
 replied that "the receipt was not there, but she had no receipt." (p. 101)
 Witness replied that she had made a receipt and that he would bring
 it in. (p. 102) He did not bring it in on the day of the trial and showed
 him a photostatic copy of the receipt. (p. 103) He said that "she
 had no receipt" and that she had paid \$100.00, and then went right over to
 the cashier's window and withdrew it. (p. 104) He had not the receipt, she
 thereupon the witness indicated it defendant had not written showing
 that receipt had received and that the receipt replied that they
 had and suggested that the witness call again and he would be shown
 the receipt. (p. 105) Defendant called back and showed him defendant's
 check for \$100.00, No. 12345, dated November 14, 1938, payable to plain-
 tiff's order. (p. 106) This is the same check mentioned above and which is
 the receipt. (p. 107) He is not sure for what in his name. (p. 108)
 Witness further testified on cross-examination "I only said the
 first time it was a receipt; I said the next time that she
 paid the money in one window and withdrew it at the next window;
 he said two different windows."
 The defendant's name is shown in the name of Hoot's Building.
 Defendant's five witnesses were shown (margin blank), (p. 109)
 (witness's name), (p. 110) (witness's name) and one signed with
 the number (p. 111) and (p. 112) (witness's name) and
 (p. 113) (witness's name).
 (p. 114) (witness's name).
 (p. 115) (witness's name) in testimony, 1938, he was defendant.
 (p. 116) "margin blank on the receipt." (p. 117) (witness's name) 1938,
 and "only margin needed on the receipt was about 100 or 125," and
 "it was not a receipt at all," he was the witness; that he never saw
 the receipt's margin for 1938 and 1939, which plaintiff claimed she
 deposited on November 14, 1938, on the day "there was a big note
 to me from Berlin, (witness's) department, about 'half a block

away" from me; that "I directed someone to make out defendants' exhibit 2" (i.e., defendants' check, No. 24279, for \$450, payable to plaintiff's order); and that the witness only saw plaintiff once in the office and that was "sometime in 1929."

Perkins testified that, under directions from McHale, he "wrote out defendants' exhibit 2;" that he wrote it out after 2 o'clock, p. m. on November 23rd, but dated it November 24th, because it was the rule of the office "to date all items after 2 o'clock, p.m. as of the following day;" that after it was signed he "handed the check to someone who answered the name of La Pook," but that he "cannot swear that it was Miss La Pook;" that he again saw the check after it had been cancelled and returned from the bank on which it was drawn; and that. "I cannot account for the lack of endorsement" by Miss La Pook.

Barber testified that on November 23, 1928, he first issued the receipt, No. 17875, for plaintiff's check for \$500; that later in the afternoon and "evidently after 2 o'clock, p. m.," he issued the receipt, No. 17877, for another check for \$450; that he has seen defendants' check, No. 24279, for \$450, and "it was shortly after this transaction happened, and when the matter came up as to why the check was issued, when the records were procured to explain to Miss La Pook why the check was drawn and why it was redeposited;" that he gave the receipt, No. 17877, when defendants' check, No. 24279, was redeposited by Miss La Pook; that he received defendants' check from her; that "I am sure Miss La Pook gave it to me; I did not require her to endorse the check; it should have been endorsed but I did not notice it until later; I overlooked it;" and that "I don't remember other transactions with Miss La Pook; I do remember this matter, because I remember her; the name attracted my attention when this matter was brought up shortly after the transaction was had and we checked up our records; I had seen her two or three times

any" from me; that "I directed someone to make out a check for \$100.00, payable to the order of the plaintiff, and that the witness only saw plaintiff once in the office and that was sometime in 1952."

Rekins testified that, under direction from Kallala, he "wrote out a check" exhibit 21; that he wrote it out after 2 o'clock, p. m. on November 22nd, but dated it November 21st. Because it was the rule of the office "to date all items after 2 o'clock, p. m. as of the following day" that after it was signed he "handed the check to someone who answered the name of Mr. [redacted]"; that he "cannot swear that it was him to look"; that he again saw the check after it had been cashed and returned from the bank on which it was drawn; and that "I cannot remember for the lack of memory" by him to look.

Earlier testified that on November 22, 1952, he first issued the receipt, No. 17875, for plaintiff's check for \$200; that later in the afternoon and "probably" after 2 o'clock, p. m., he issued the receipt, No. 17876, for another check for \$200; that he has seen defendant's check, No. 18475, dated 11/22/52, and "it was shortly after this transaction happened, and when the matter came up as to why the check was issued, when the records were reviewed, to explain to him as to why the check was drawn and why it was not paid; that he gave the receipt, No. 17876, when defendant's check, No. 18475, was cashed by him; he testified that he received defendant's check from him; that "I am sure that he took care to not let it not register her to endorse the check; it should have been endorsed but I did not notice it until later; I overlooked it;" and that "I don't remember other transactions with Miss [redacted]; I do remember this matter, because I remember that the name attracted my attention when this matter was brought up shortly after the transaction was had and we checked up our records; I had seen her two or three times

before; I saw this check again when we checked up our records shortly after December 1, 1928; the check was deposited in the First National Bank."

Bradley testified that in November, 1928, his duties as cashier of defendants "were to receive money and issue checks, countersign checks, give receipts, take in deliveries and see that they were paid for," and that he had several assistants. He identified two so-called "cash sheets," taken from defendants' loose leaf cash book. They were introduced in evidence as "Defendants' exhibits 4 and 5." He further testified:

"These sheets were made out by myself on November 23rd and 24th, 1928. * * On them there are references to plaintiff's account. The entries were correct at the time they were made. They are original entries. Among them are two credits for \$450 and \$500, both of them on November 24th. * * They may have been on November 23rd and entered after 2 o'clock of that day as of November 24th. * * There is nothing, except the position of the entry in the book, to indicate that these payments were made after 2 o'clock, p. m., and this does not help. * *"

"The Court: I am not satisfied yet."

Bradley further testified on cross-examination:

"The people who had access to defendants' check book (introduced in evidence as Defendants' Exhibit 6) to write checks are myself and Perkins and perhaps Mr. Morley. Checks are written on instructions depending on where they come from, - the margin man as a rule. The bookkeeper O.K.'s the instructions. They come in writing to us. * * If a customer comes in and wants to get a check out of his account, the request must be by the margin man, but the request does not have to be in writing. * * The margin man's O.K. is authority for me to pay the check. * * This particular check (defendants' exhibit 2, No. 24279) wouldn't have to go through the Clearing House if deposited in the First National Bank (on which it was drawn). * * When I deposited it I looked at the amount. * * I do not look at the endorsement on checks when I enter them. The check should have been endorsed, of course. * * I don't know how it went in without endorsement, which is required by the bank. The bank slipped up on it, also."

The testimony of Gaffney, the bookkeeper, was in substance that he had the telephone conversation with plaintiff as mentioned in her letter of February 13, 1929, that he had seen her several times in defendants' office, both before and after November 23, 1928; that he saw her in the office on November 23rd; that she personally made the deposit of the check for \$500 on November 23rd;

that after she received defendants' check, No. 24279, for \$450, payable to her order, she must have personally redeposited it with defendants, although it did not go through his hands and he "never saw it" until his subsequent investigation of defendants' records; that "it didn't look peculiar to me that we should redeposit this check after issuing it without her endorsement;" that defendants had some of her stock on hand until about a year after this particular transaction; and that he last saw plaintiff in the office when she made her last deposit on her account of about \$700, in October, 1929.

In rebuttal plaintiff testified that she never saw defendants' said check for \$450, No. 24279, before it was produced at the trial; that she never received it from defendants; that she never was in defendants' office until she there personally gave her last check for about \$700, in October, 1929; that she never saw Gaffney except on that occasion; and that she never met McHale or Barder until the trial.

The several contentions of defendants' counsel really amount to one, viz., that the court's finding and judgment are manifestly against the weight of the evidence. We do not think that they are. While much of the oral testimony is very conflicting, when consideration is given to the documentary evidence (particularly (a) defendants' reply letter of February 14, 1929, (b) defendants' two receipts to plaintiff of November 23, 1928, for two checks of \$500 and \$450, respectively, (c) defendants' ledger and cash sheets, showing the two credits to plaintiff, and (d) defendants' check, No. 24279, for \$450, dated November 24, 1928, and payable to plaintiff's order and which was not endorsed by her), we cannot say that the court's action was not sufficiently warranted by the evidence.

And we find nothing in the present record to justify counsels' further contention that "the trial judge was confused

that after the receipt of the check, No. 24877, for \$500,
possible to her order, and she personally deposited it with
defendant. Although it did not go through his hands and he never
saw it until his subsequent investigation of defendant's account
that it didn't look peculiar to her that he should deposit this
check after leaving it without her endorsement; that defendant
had some of her stock on hand until about a year after this particular
transaction; and that he had been plaintiff in the office when she
made her last deposit on her account of about \$700, in October, 1929.
In rebuttal plaintiff testified that she never saw
defendant's said check for \$500, No. 24877, before it was produced
at the trial; that she never received it from defendant; that she
never was in defendant's office until she the a personally gave her
last check for about \$700, in October, 1929; that she never saw
Guthrie except on that occasion and that she never saw Mohr ex-
cept until the trial.
The several contents of defendant's account to the
amount of one, viz., the said \$500, and defendant's
testimony against the rest of the evidence. He does not think
that they are. His view of the oral testimony is very con-
flictive. When consideration is given to the documentary evidence
(particularly (a) defendant's reply letter of February 14, 1930,
(c) defendant's two receipts to plaintiff of November 22, 1929,
for two checks of \$500 and \$500, respectively, (d) defendant's
larger and cash check, showing the two amounts to plaintiff, and
(d) defendant's check, No. 24877, for \$500, dated November 22, 1929,
and payable to plaintiff's order (the latter two not introduced by her),
we cannot say that the oral evidence is not sufficiently supported
by the evidence.

and on line section in the present record to justify
conclusion, further consideration that the trial judge was convinced

by the evidence." The contrary is apparent. And while it may be true, as urged by counsel, that plaintiff's failure to produce, or to account for, the two cashier's checks of \$500 and \$450, respectively, for which she was credited on defendants' books, on November 24, 1928, lessens the strength of her case as proven, still we are of the opinion from all the evidence, and many circumstances in evidence, that the court's finding was proper and that the judgment appealed from should not be disturbed. Accordingly, the judgment is affirmed.

AFFIRMED.

Sullivan, P. J., and Seanlan, J., concur.

The witness is advised.

36452

47 A

ANNA LAKOFF et al.,
Complainants,

v.

KLOP I. PETERSON et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ARTHUR FREYTAG, Receiver,
Petitioner and Appellee,

v.

G. S. JACKSON,
Respondent and Appellant.

271 I.A. 601³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal G. S. Jackson seeks to reverse an order entered by the superior court in the above entitled foreclosure proceeding on September 22, 1932, as follows:

"This cause coming on to be heard upon the petition of the receiver herein * * for an order directing G. S. Jackson, a tenant of the premises involved in this proceeding to pay the rentals in arrears, and it appearing to the court that due notice of the presentation of said petition has been given to said tenant, and the court being fully advised in the premises, IT IS HEREBY ORDERED that said G. S. Jackson pay to Arthur Freytag, receiver herein, the amount of the rentals in arrears for June and July, 1932, to-wit, \$80, within 10 days from the date hereof."

From the pleadings and a "bill of exceptions" contained in the present transcript the following facts appear: On May 27, 1932, complainants filed their sworn bill to foreclose a trust deed upon the premises, at 1518 Hollywood avenue, Chicago, improved by an apartment building. By the trust deed the rents, issues and profits were pledged as additional security for the indebtedness, in the payment of which there had been defaults. The bill prayed for the appointment of a receiver pendente lite to collect the rents, etc. At the time of the filing of the bill, and prior

ALMA BARRY et al.,
Complainants

v.

WILLIAM I. JACKSON et al.,
Defendants

WILLIAM I. JACKSON

ALMA BARRY, Receiver,
Petitioner and Appellee

WILLIAM I. JACKSON

WILLIAM I. JACKSON

v.

WILLIAM I. JACKSON,
Respondent and Appellant

28482 I.A. 601

WILLIAM I. JACKSON, Respondent and Appellant

By this appeal, W. I. Jackson seeks to reverse an order

entered by the superior court in the above entitled proceedings

proceeding on September 22, 1932, as follows:

"This cause coming on to be heard upon the petition of
the receiver herein, for an order directing W. I. Jackson, a
tenant of the premises involved in this proceeding, to pay the
rents in arrears, and its execution to the court that the notice
of the presentation of said petition has been given to said tenant,
and the court being fully advised in the premises, it is hereby
ORDERED that W. I. Jackson pay to certain trustee, receiver
herein, the amount of the rents in arrears for June and July,
1932, to-wit: \$80, within 10 days from the date hereof."

From the findings and a bill of exceptions contained

in the present transcript the following facts appear: On May 27,

1932, complainant filed their action and in substance a lease was

upon the premises, at 1212 Hollywood Avenue, Los Angeles, improved by

an apartment building. By the lease and the rules, terms and

provisions were placed as additional security for the indebtedness,

in the payment of which there had been default. The bill stated

for the payment of a receiver pursuant to call of the

rents, etc. At the time of the filing of the bill, and prior

thereto, one Carrie Offenbergs was the owner of the equity of redemption and was in possession of the building. On May 24, 1932 (three days before the filing of the bill) she entered into a written lease with Jackson and wife, whereby she demised to them a certain apartment in the building, at a rental of \$40 a month, payable in advance, and for a term from June 1, 1932, to May 31, 1934. On the face of the lease is the following:

"Receipt is hereby acknowledged of the payment of the sum of \$480, as payment of the rental due hereunder for the term beginning June 1, 1932, to May 31, 1933; that commencing with June 1, 1933, the said lessees shall pay the monthly rental above provided on the first day of each succeeding month during the balance of the term hereof; that during the month of June, 1933, the lessees shall at their own expense redecorate the said apartment. And, in consideration of the rental provided for herein, the lessees agree to redecorate the entire apartment before entering the said premises at their own expense."

On June 2, 1932, Freytag was appointed receiver with usual powers, and thereafter qualified and took possession of the building. Numerous findings of fact were made in the order appointing him, showing the necessity of such appointment to conserve the rents, etc. In the order all persons in possession of any parts of the building, as tenants, were directed to pay rents to the receiver; and if they failed to do so to surrender possession to him. And he was given power to receive, collect and enforce the payment of rents, etc. On August 4, 1932, the receiver filed a petition, alleging inter alia that Jackson is and has been occupying an apartment on the third floor of the building, that "a reasonable rental" for the apartment is \$40 a month, and that Jackson has refused to pay rent therefor for the months of June and July, 1932. The prayer of the petition was for a court order directing Jackson to pay to the receiver, within a short day to be fixed, the amount "of rentals in arrears, to-wit, \$80." Thereafter on August 9, 1932, Jackson, having been given notice of the filing of the receiver's petition, filed an answer to it, and on September 22, 1932, there was a hearing in open court, resulting in the entry of the order appealed

thereof, one Jarvis Olinburg was the owner of the right of
possession and was in possession of the building. On May 24, 1932
(three days before the filing of the bill) she entered into a written
lease with Jackson and wife, whereby she agreed to lease a certain
apartment in the building, at a rental of \$40 a month, payable in
advance, and for a term from June 1, 1932, to May 31, 1934. On the
face of the lease is the following:

"Needle is hereby acknowledged of the payment of the
sum of \$40, as payment of the rental due in advance for the term
beginning June 1, 1932, to May 31, 1933; that commencing with
June 1, 1933, the said lessee shall pay the monthly rental above
provided on the first day of each succeeding month during the
balance of the term hereof; that during the month of June, 1933,
the lessee shall at their own expense redecorate the said apart-
ment, and, in consideration of the rental provided for here-
in, the lessee agrees to redecorate the entire apartment before
entering the said premises at their own expense."

On June 2, 1932, Taylor was appointed receiver with
usual powers, and thereafter qualified and took possession of the
building. Subsequent findings of fact were made in the order appointing
him, making the necessity of such appointment to conserve the rents,
etc. In the order all persons in possession of any part of the
building, as tenants, were directed to pay rents to the receiver; and
it was found to be so in substance possession to him. And he was
given power to receive, collect and hold the payment of rents,
etc. On August 1, 1932, the receiver filed a petition, alleging
inter alia that Jackson had been occupying an apartment on
the third floor of the building, that "a responsible tenant" for the
apartment is \$40 a month, and that Jackson had refused to pay rent
therefor for the months of June and July, 1932. The prayer of the
petition was for a writ of order directing Jackson to pay to the
receiver, within a short day to be fixed, the amount "of rents in
arrear, to-wit, \$80." Thereafter on August 2, 1932, Jackson,
having been given notice of the filing of the receiver's petition,
filed an answer to it, and on September 22, 1932, there was a
hearing in open court, resulting in the entry of the order appealed

from. The bill of exceptions does not disclose that at the hearing any witnesses gave testimony, but it appears that certain statements or admissions as to the facts were made by opposing counsel. The lease above referred to was introduced in evidence by Jackson's counsel, but it does not sufficiently appear from counsel's statements or admissions that the \$480, mentioned in the lease as having been received from Jackson by Carrie Offenberg on May 24, 1932, was in fact then paid by Jackson. Nor does it appear that Jackson actually became a tenant of the apartment prior to the receiver's appointment as such.

Assuming that it sufficiently appeared on the hearing that Jackson had made said payment of \$480 to Carrie Offenberg, counsel for Jackson contend that the receiver is barred from the collection from Jackson of any rent for said months of June and July, 1932, and that the court erred in entering the order in question. The well-settled law of this State is to the contrary. (Rohrer v. Deatherage, 336 Ill. 450, 456; Greenebaum Sons Bank & Trust Co. v. Kingsbury, 248 Ill. App. 321, 333; Belleville Savings Bank v. Souris, 266 Ill. App. 565, 567.) In the last cited case it is said: "If a person accepts a lease of mortgaged premises and a receiver is appointed in foreclosure proceedings, the lessee must pay rent to the receiver from the day of his appointment or vacate the premises. If he has paid the mortgagor rent in advance he will be required to pay rent to the receiver from the date of his appointment if he remains in possession."

Equally without merit is counsel's further contention that, because it does not appear that Jackson was made a party by name to the foreclosure bill, the court was without jurisdiction to enter the order in question. He was a party to the receiver's petition, filed an answer to it on the merits, and contested the right of the receiver to the relief prayed as against him. He

from. The bill of exceptions does not disclose that at the hearing
any witnesses gave testimony, but it appears that certain facts
were or admissions as to the facts were made by opposing counsel.
The issue above referred to was introduced in evidence by Jackson's
counsel, but it does not sufficiently appear from counsel's state-
ments or admissions that the issue mentioned in the issue as having
been received from Jackson by Marie Oltmann on May 14, 1934, was
in fact then paid by Jackson. Nor does it appear that Jackson
secretly became a tenant of the apartment prior to the receiver's
appointment as such.

It is respectfully requested on the hearing
that Jackson had made him payment of \$250 to Marie Oltmann,
counsel for Jackson contends that the receiver in barred from the
collection from Jackson of any rent for a number of June and
July, 1934, and that she could enter in entering the order in
question. The well-settled law of this State is to the contrary.

In re Jackson, 200 Ill. App. 450, 451; Greenberg and Jackson
Trust Co. v. Greenberg, 200 Ill. App. 451, 452; Jackson v. Greenberg
and Jackson, 200 Ill. App. 452, 453. In the last cited case

it is said: "If a person occupies a house of mortgaged premises
and a receiver is appointed in foreclosure proceedings, the house
must be sent to the receiver from the day of his appointment or
prior to the foreclosure. If he has paid the mortgage rent in advance
he will be required to pay rent to the receiver from the date of
his appointment if he remains in possession."

It is respectfully requested that the receiver's
claim, because it does not appear that Jackson was sent a bill by
rent to the receiver's bill, and rent was without jurisdiction
to enter the order in question. He was a party to the receiver's
petition, filed an answer to it on the merits, and contested the
right of the receiver to the relief prayed for against him. He

raised no question as to the court's jurisdiction over his person in the superior court, and it is clear that the court had jurisdiction of the subject matter. (See Wilson Bros. v. Haegge, 347 Ill. 140, 143; King v. Snow, 266 Ill. App. 462, 464.)

The order of the superior court of September 22, 1932, should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

36468

CHICAGO TRUST CO., a corporation,
administrator of estate of HAROLD
ELLIOTT, also known as Harold
Conway, deceased,

Plaintiff in Error,

v.

CITY OF CHICAGO, a municipal
corporation,

Defendant in Error.

48 A
ERROR TO SUPERIOR
COURT, COOK COUNTY.

271 I.A. 601⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This case involves the doctrine of attractive nuisance. On August 1, 1929, plaintiff, as administrator, etc., commenced an action in sue to recover damages because of the city's negligence resulting in the death of a boy, ten years of age, in the late evening of May 24, 1929. A trial was had before a jury in May, 1932, at which several witnesses testified for plaintiff as to the details of the accident, etc., and two photographs of a certain electric light pole and lamp, standing in Argyle street, Chicago, at the corner of an alley, were introduced in evidence. At the conclusion of plaintiff's evidence the court, on the city's motion, instructed the jury to find the city not guilty. After such verdict had been returned, judgment was entered against plaintiff on May 27, 1932, which it seeks to reverse by this writ of error.

Plaintiff's evidence disclosed the following facts in substance: For a long time prior to the accident the city possessed, maintained and controlled, for the purpose of illumination at night, a series of tubular, metal poles, at the top of which was strung a heavy wire, carrying a high voltage of electricity. The wire was connected with an electric lamp and metal reflector on each pole, which lamp and reflector were suspended from a bracket

CHICAGO TRUST CO., a corporation,
Administrator of estate of MARION
WILLIAMS, alias known as Harold
Conroy, deceased,
Plaintiff in error,

v.

CITY OF CHICAGO, a municipal
corporation,
Defendant in error.

IN SENATE
JANUARY 20, 1932.

SENATE

THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS.

This case involves the doctrine of attractive nuisance.
On August 1, 1927, plaintiff, an administrator, etc., commenced an
action in error to reverse a judgment of the city's negligence
resulting in the death of a boy, ten years of age, in the late
evening of May 24, 1926. A trial was had before a jury in May,
1932, at which several witnesses testified for plaintiff as to the
details of the accident, etc., and two photographs of a certain
electric light pole and lamp, standing in public street, Chicago,
at the corner of an alley, were introduced in evidence. At the
conclusion of plaintiff's evidence the court, on the city's motion,
instructed the jury to find the city not guilty. That such verdict
had been returned, judgment was entered against plaintiff on May 27,
1932, which it seeks to reverse by writ of error.

Plaintiff's evidence disclosed the following facts in

testimony: For a long time prior to the accident the city
possessed, maintained and controlled, for the purpose of illumination
at night, a series of wooden, metal poles, at the top of which was
strung a heavy wire, carrying a high voltage of electricity. The
wire was connected with an electric lamp and metal reflector on
each pole, which lamp and reflector were supported from a bracket

attached to the pole near the top. One of these poles was standing in the parkway, between the sidewalk and the street, in front of No 1910 Argyle street (a public street) and also near an intersecting alley. The pole was about 28 feet high and had an opening or hole in it about 4 feet from the ground. The size of the hole was about 4 x 6 inches. Commencing about 5 feet above the hole was a series of steps or projections leading to the top, for convenience in climbing. Because of the hole and steps it was easy for an active boy to climb to the top of the pole. During the trial it was stipulated in substance that the construction of the lamp, bracket, metal reflector, etc., was such that any person, having climbed the pole and coming in contact with the reflector and being in contact with the pole at the same time, would receive an electric shock sufficient to cause his death; that the overhead wire carried a voltage of 5,050 volts; that plaintiff's intestate, having climbed the pole and having his foot on one of the projections, in some way touched the reflector, received a severe shock and fell to the ground. He came to his death from electric shock and skull fracture. It further appeared from plaintiff's evidence that the pole had an attraction for children and that they frequently played about it and climbed or attempted to climb it. One of the witnesses, Tornstrand, a boy playmate of plaintiff's intestate at the time, testified as to the happenings immediately before the accident, in substance, that a number of boys were playing with a "gunny sack" around the pole; that Harold threw the sack over the first projecting step, where it caught and remained hanging; that Harold climbed the pole and released the sack; that he said that it "was not hard to climb the pole" and started to climb up to the top; that the witness warned him of the danger of so doing; that he replied that "there is not anything up there that is dangerous," and he continued to climb; that afterward the accident happened; that in climbing the pole Harold first "put his foot in the small

attached to the pole near the top. One of these poles was standing in the parkway, between the sidewalk and the street, in front of the 1911 Arvey Hotel (a public house) and also near an interesting alley. The pole was about 10 feet high and had an opening at the top about 4 feet from the ground. The rim of the hole was about 4 x 6 inches. Continuing about 2 feet above the hole was a series of steps or projections leading to the top for convenience in climbing. Because of the hole and steps it was very easy for an active boy to climb to the top of the pole. During the trial it was witnessed in substance that the construction of the hole, brackets, metal reflector, etc., was such that any person, having climbed the pole and coming in contact with the reflector and being in contact with the pole at the same time, would receive an electric shock sufficient to cause him to jump. That the overhead wire carries a voltage of 2,000 volts; that Plaintiff's indictment, having climbed the pole and having his foot on one of the projections, in some way touched the reflector, received a severe shock and fell to the ground. He came to himself from electric shock and fell to the ground. It further appeared from Plaintiff's evidence that the pole had an attraction for children and that they frequently played about it and climbed or attempted to climb it. One of the witnesses, Foreman, a boy, Plaintiff's interest in the case, testified as to the happenings immediately before the accident, in substance, that a number of boys were playing with a "heavy rock" around the pole and that he told them to stop over the fixed projecting steps, where it could not remain hanging; that he climbed the pole and released the rock; that he saw that it was not hard to climb the pole and started to climb up to the top; that the witness warned him of the danger of an electric shock; that he replied that "there is no way thing up there that is dangerous" and he continued to climb; that all these things happened; that in climbing the pole he made three "one foot" in the air.

hole in the pole, then grabbed the pole and went up, then got up to the first rung or landing and then climbed up."

The sole question for our determination is whether the trial court erred in directing a verdict for defendant at the close of plaintiff's evidence. After a careful review of the evidence, and considering all the facts and circumstances in evidence and all justifiable inferences to be drawn therefrom, we are of the opinion that the court erred in not denying defendant's motion for such directed verdict and, after defendant had been allowed to introduce evidence in its behalf, in not submitting the case to the jury. In April, 1932, this division of this appellate court was called upon to review a judgment of the superior court for \$3,300, rendered after verdict, against the City of Chicago, in the case of Union Bank of Chicago, guardian of the estate of Benjamin Miller, a ten year old boy, against the City of Chicago, 266 Ill. App. 596. The facts of that case are very similar to those as shown by plaintiff's evidence in the present case. The boy climbed a similar pole, situated in a public street and maintained and controlled by the city. After he had climbed nearly to the top he received in a similar manner a severe electric shock, fell to the ground and sustained serious though not fatal injuries. The main contention of the city in that case was that the trial court had erred in not granting its motions for a directed verdict in its favor. And counsel for the city relied, as they do in the present case, upon the decision and holdings of our Supreme Court in Burns v. City of Chicago, 338 Ill. 89. We affirmed the judgment, and in our unpublished opinion we made the following holdings, which we think are particularly applicable to the present case, viz:

"The argument is that under the holdings and decision in the case of Burns v. City of Chicago, 338 Ill. 89, the pole in question cannot legally be considered as an attractive nuisance. We cannot agree with the contention or argument. In the Burns case, where a boy about eight years old climbed a somewhat similar pole and met his death because of receiving an electric shock while on

hole in the paper, then dropped the pole and went up. Then he went up to the first or second and then climbed up.

The sole question for our determination is whether the trial court erred in admitting a statement for defendant at the close of plaintiff's evidence. After a careful review of the evidence, and considering all the facts and circumstances in evidence and all trustworthy inferences to be drawn therefrom, we are of the opinion that the court acted in not admitting defendant's motion for such evidence very late and that defendant had been allowed an adequate opportunity in the verdict, in not admitting the same to the jury. It

appears in the record, in not admitting the same to the jury. In 1937, this division of the appellate court was called upon to review a judgment of the superior court for \$3,300, rendered after verdict, against the city of Chicago, in the case of John Markel of Chicago, guardian of the estate of Benjamin Miller, a ten year old boy, against the city of Chicago, 300 Ill. App. 398. The facts

of that case are very similar to those as shown by plaintiff's evidence in the present case. The boy climbed a similar pole, situated in a public street and maintained and controlled by the city. After he had climbed nearly to the top he received in a similar manner a severe electric shock, fell to the ground and sustained serious though not fatal injuries. He was taken to the hospital and remained there for several days. The trial court had erred in not admitting the motion for a directed verdict in the present case, and reversal for the city failed.

as they do in the present case, upon the evidence and findings of our court. In John Markel v. City of Chicago, 300 Ill. App. 398, we affirmed the judgment, and in our unpublished opinion we made the following holdings, which we believe are particularly applicable to the present case, viz:

"The evidence is that when the plaintiff and defendant in the case of John Markel v. City of Chicago, 300 Ill. App. 398, the boy in question climbed the pole and received a severe electric shock, and sustained serious though not fatal injuries. In the present case, the boy, John Markel, climbed a similar pole, situated in a public street and maintained and controlled by the city. After he had climbed nearly to the top he received in a similar manner a severe electric shock, fell to the ground and sustained serious though not fatal injuries. He was taken to the hospital and remained there for several days. The trial court had erred in not admitting the motion for a directed verdict in the present case, and reversal for the city failed.

the pole, it was held that the city was not liable on the ground of maintaining an attractive nuisance, because the evidence disclosed that said boy had climbed the pole by extraordinary effort for the purpose of winning a wager. There is no such element disclosed in the present case, which is more similar in its fact to the more recent case of Wolozek v. Public Service Co., 342 Ill. 482, where our Supreme Court held that a liability to plaintiff existed, and on pages 490 and 491 distinguished the Burns case. In the case of Fleming v. City of Chicago, 260 Ill. App. 456, 505, decided by the third division of the appellate court for this district in March, 1931, said Burns case also was distinguished. Under the facts disclosed in the present case we are of the opinion that the questions, whether the city was negligently maintaining an attractive nuisance and whether the Miller boy at the time of the accident was exercising such care and caution as is required of one of his age, intelligence and capacity, were for the jury to determine (Flig v. City of Chicago, 247 Ill. App. 123, 133; Wolozek v. Public Service Co., 342 Ill. 482, 493-5,) and we are not disposed to disturb the judgment."

Our conclusion is that the judgment of the superior court of May 27, 1932, appealed from, should be reversed and the cause remanded. Such will be the order.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

36470

ACHILLE SCULLY,
Defendant in Error,

v.

L. J. KEEFE,
Plaintiff in Error.

49 7
} ERROR TO MUNICIPAL
COURT OF CHICAGO.

271 I.A. 602

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Achille Scully, plaintiff, sued L. J. Keefe, defendant, in the Municipal court of Chicago in an action of the first class. The case was tried before the court, upon an amended statement of claim, which alleged, in substance, that plaintiff had been employed by defendant and had performed certain services, and further alleged "an account stated between the parties, numerous statements of the said account having been sent to the defendant and no objection made thereto at various times during Dec. 1931 in Chicago, Illinois when account has accrued." The balance alleged to be due under the account stated was \$2,464.27. Defendant filed an affidavit of merits denying the material allegations contained in the amended statement of claim. There was a finding and judgment against defendant in the sum of \$2,407.32.

The case was tried upon the sole issue as to whether or not an account had been stated.

Defendant contends, with considerable force, that the evidence for plaintiff failed to make out a prima facie case of an account stated. However, we do not deem it necessary to determine this contention as the further contention that "the preponderance of the evidence does not support an account stated" is clearly a meritorious one and, as we read this record, it would be a grave injustice to permit the judgment in this case to stand. Plaintiff,

WILLIAM G. KELLY,
Defendant in Error,
v.
J. J. KELLY,
Plaintiff in Error.

REPORT TO THE JUDICIAL
COURT OF THE STATE OF ILLINOIS

271 I.A. 602

MR. JUSTICE WILLIAM KELLY, THE CHIEF OF THE COURT.

William G. Kelly, Plaintiff, and J. J. Kelly, Defendant,
in the Municipal Court of Chicago in an action of the first class.
The case was tried before the court, upon an amended statement of
claim, which alleged, in substance, that plaintiff had been employed
by defendant and had performed certain services, and further alleged
"an account stated between the parties, numerous statements of the
said account having been sent to the defendant and no objection made
thereat at various times during the year 1901 in Chicago, Illinois
when account was rendered." The balance alleged to be due under the
account stated was \$2,447.32. Defendant filed an affidavit of merits
denying the material allegation contained in the amended statement
of claim. There was a finding and judgment against defendant in
the sum of \$2,447.32.

The case was tried upon the sole issue as to whether or
not an account had been stated.
Independent testimony, which was admissible before, that the
evidence for plaintiff failed to establish a prima facie case of an
account stated. However, as it was then necessary to determine
this question as the proper presentation of the proper evidence
of the evidence was not sufficient to support an account stated, it was
necessary to say that, as it was then necessary, it would be a
finding to permit the judgment in this case to stand. Plaintiff.

in this court, does not attempt to answer the contention of defendant in reference to the alleged account stated, but seeks, by assuming an attitude in this court inconsistent with that taken by him at the trial, to sustain the judgment. It is a settled rule that the attitude of the parties must remain the same here as in the trial court and that the controversy between them is to be determined upon the theory on which the cause was prosecuted or defended in the court below. Even if we were to ignore that well established rule we would not be inclined to adopt plaintiff's strained interpretation of defendant's affidavit of merits.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

in this court, does not stand so much as the contention of
defendant in reference to the alleged amount stated, but we have
by assuming an attitude in this court inconsistent with that
taken by him at the trial, so much as the judgment. It is a
settled rule that the attitude of the parties must remain the
same here as in the trial court and that the controversy between
them is to be determined upon the basis on which the cause was
presented or defended in the court below. We are aware of
the fact that well established rules of procedure may be applied to
these plaintiffs' claims in the interpretation of defendant's affidavit
of merits.

The judgment of the appellate court in Chicago is

reversed and the case is remanded for a new trial.

WILLIAM J. BRYCE, J.

WILLIAM J. BRYCE, J. and WILLIAM J. BRYCE, J.

36518

CHARLES H. JOY et al.,
(Complainants) Appellees,

v.

DITTO, INCORPORATED, a
Corporation, et al.,
Defendants.

JOSEPH M. CHENEY,
(Defendant) Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

271 I.A. 602²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals of Guy H. Abbott (App. Ct. Gen. No. 36517) and K. M. Henderson (App. Ct. Gen. No. 36519.) We have this day filed an opinion in cause No. 36517 and for the reasons therein stated the decree as to Joseph M. Cheney, the appellant in the instant case, is reversed and the cause remanded with directions to dismiss complainants' bill as to Joseph M. Cheney for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

3811

CHARLES H. HAYES et al.
(Complainants) vs.

v.

JOHN H. HENRY et al.
(Defendants)

JOHN H. HENRY et al.
(Defendants)

STATE OF NEW YORK
COUNTY OF NEW YORK

281 I.A. 603

IN SENATE, JANUARY 10, 1911.

This appeal was consolidated for hearing with the appeals

of GUY H. HADLEY (App. Ct. Gen. No. 38017) and E. M. HENDERSON

(App. Ct. Gen. No. 38018). We have this day filed an opinion in

cases No. 38017 and 38018 and for the reasons therein stated the decision as to

Joseph M. Henry, the appellant in the instant case, is reversed

and the case remanded with directions to dismiss complainant's

bill as to Joseph M. Henry for want of equity.

REVEREND THE CHIEF JUSTICE OF THE SENATE.

Witness my hand and official seal this 10th day of January, 1911.

36519

CHARLES H. JOY et al.,
(Complainants) Appellees,

v.

DITTO, INCORPORATED, a
Corporation, et al.,
Defendants.

K. M. HENDERSON,
(Defendant) Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

271 I.A. 602³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeals of Guy H. Abbott (App. Ct. Gen. No. 36517) and Joseph M. Cheney (App. Ct. Gen. No. 36518.) We have this day filed an opinion in cause No. 36517 and for the reasons therein stated the decree as to K. M. Henderson, the appellant in the instant case, is reversed and the cause remanded with directions to dismiss complainants' bill as to K. M. Henderson for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

CHAS. E. JOY et al.
(Complainants) Appellants

v.

THE INDEPENDENT
CORPORATION et al.
Defendants

U. S. DISTRICT COURT
(Southern District of New York)

STATE OF NEW YORK
COUNTY OF NEW YORK
JULY 10, 1934

1934 JUL 10

THE COURT hereby orders that the parties to the above

appeal be and are to be notified for hearing with the parties
of the Court (app. 1000, 1001) and Joseph E. JOY (app.
1002, 1003). We have this day filed an opinion in case
No. 1004 and for the reasons therein stated the order as to E. E.
JOY, the appellant in the instant case, is reversed and the
case remanded with directions to the complainants' bill as to
E. E. JOY for and of equity.
IT IS SO ORDERED.

Witness my hand and seal of office, this 10th day of July, 1934.

36563

EVELYN STEIN,
Appellee,

v.

CHICAGO MOTOR COACH
COMPANY, a Corporation,
Appellant.

52 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 602⁴

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in an action of the fourth class to recover damages for injuries sustained by her while she was a passenger on a coach of the defendant. The case was tried by the court, without a jury, and there was a finding for plaintiff and a judgment entered against the defendant in the sum of \$75. Defendant has appealed.

The accident occurred on March 25, 1932, at about 5:30 p. m., while plaintiff was a passenger on a southbound coach of defendant on Ashland boulevard between Polk and Taylor streets. She was seated on the right hand side of the coach and on the upper deck. There was snow on the parkway and in places where it had been piled. The motorman stopped at Polk street to discharge passengers and then proceeded southward, and while the coach was between Polk and Taylor streets a window on the east side of the coach was "smashed" and plaintiff thereby received some slight cuts.

Plaintiff's statement of claim charged that the windows of the coach "were not equipped in such manner and such form as to protect the defendants' passengers, and her, the plaintiff, from any breakage of glass that may occur while she, the plaintiff, was a passenger on the said bus," etc. No showing was made as to any

CHICAGO, ILL.,
JANUARY 1, 1935.

CHICAGO BOARD OF
CITY, ILL. DEPARTMENT
OF PUBLIC SAFETY

CHICAGO BOARD OF
CITY, ILL. DEPARTMENT
OF PUBLIC SAFETY

CHICAGO BOARD OF
CITY, ILL. DEPARTMENT
OF PUBLIC SAFETY

CHICAGO BOARD OF
CITY, ILL. DEPARTMENT
OF PUBLIC SAFETY

Plaintiff was detained in the Chicago County Jail
Chicago in an action of the law to recover damages for
injuries sustained by her while she was a prisoner in a certain
of the defendant. The case was tried by the court, without a
jury, and there was a finding for plaintiff and a judgment entered
against the defendant in the sum of \$75. Defendant has appealed.

The accident occurred on March 22, 1932, at about 8:30
a. m., while plaintiff was a passenger in a motor vehicle owned by
defendant on a route between Chicago and Taylor, Illinois.
The car was loaded on the right side of the road and on the upper
deck. There was room on the highway and in places where it had
been placed. The motorist stopped at Polk Street to discharge
passengers and then proceeded northward, and while the car was
between Polk and Taylor streets a window on the west side of the
coach was "crushed" and plaintiff thereby received some slight
injury.

Plaintiff's statement of what happened and the time
of the crash "was not changed in such manner and such form as to
protect the defendant's passengers, and here, the plaintiff, from any
burdenage at this time and even while she, the plaintiff, was a
passenger on the coach bus," etc. No showing was made as to why

defect in the windows or the glass. The finding of the court was based upon the theory that the accident "may have been caused by a faulty installation of the glass * * * the glass should have been thick enough to repel snowballs." Defendant contends that this conclusion of the trial court was not warranted by the facts nor the law, but we do not deem it necessary to pass upon this contention.

In its brief defendant states: "The true test of the liability in this case is, did the defendant have notice of the danger to its passengers in order to protect them from dangers not incident to ordinary travel." We agree that this is the real issue in the case. The mere fact that plaintiff's statement of claim is predicated upon the theory that defendant was negligent in the manner in which it equipped the windows is not controlling, as this is a fourth class action and the plaintiff's case is what the evidence makes it. There is evidence to show that as the coach stopped at Polk street "big boys" commenced to throw snowballs at the coach and that they continued to do so as the coach proceeded southward between Polk and Taylor streets. Three windows in the upper deck of the coach were broken "by snowballs coming through them," as the coach proceeded southward between the two streets. At least two women passengers were injured by the breaking of the glass. It is a reasonable inference from the evidence that the glass was broken when the coach reached a point directly west of the place where the boys were located. The contention of defendant that there was no evidence that tended to show notice to the driver of probable danger to the passengers, is without merit. We certainly cannot hold, as a matter of law, that it was not negligence that proximately contributed to bring about the injuries to plaintiff for the driver of the coach to proceed southward under a fusillade of snowballs directed at the coach.

The judgment of the Municipal Court of Chicago is affirmed.
Sullivan, P.J., and Gridley, J., concur. AFFIRMED.

dated in the windows or the glass. The finding of the court was based upon the theory that the accident "may have been caused by a faulty installation of the glass." The glass should have been thick enough to resist snowballs. Defendant contends that this conclusion of the trial court was not warranted by the facts nor the law, but we do not deem it necessary to pass upon this contention.

In the brief defendant states: "The true test of the liability in this case is, did the defendant have notice of the danger to its passengers in order to protect them from dangers not incident to ordinary travel." We agree that this is the real issue in the case. The mere fact that plaintiff's statement of claim is contradicted upon the theory that defendant was negligent in the manner in which it equipped the windows is not controlling, as this is a fourth class action and the plaintiff's case is what the evidence makes it. There is evidence to show that on the coach stopped at "Pink Street" boys" commenced to throw snowballs at the coach and that they continued to do so as the coach proceeded southward between Oak and Taylor Streets. These windows in the upper back of the coach were broken "by snowballs coming through them," as the coach proceeded southward between the two streets. At least two women passengers were injured by the breaking of the glass. It is a reasonable inference from the evidence that the glass was broken when the coach reached a point directly west of the place where the boys were located. The contention of defendant that there was no evidence that tended to show notice to the driver of probable danger to the passengers, is without merit. It is certainly correct to say, as a matter of law, that it was not negligent that defendant continued to drive about the injured to plaintiff for the driver of the coach to proceed southward under a failure of snowballs directed at the coach.

The judgment of the municipal court of Chicago is affirmed.

WILLIAM, J., and GRADY, J., concur.

APPROVED.

36500

F. V. PERSON,
Appellee,

vs.

DR. MAX THORREK, FANNIE THORREK,
DR. PHILIP THORREK, DR. SOL
GREENSPAHN and SIDNEY GREENSPAHN,
Appellants.

53 A
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

271 I.A. 603¹

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff Person on October 6, 1932, filed a declaration in four counts, suing defendants in assumpsit. Three of the counts in substance alleged that defendants on July 1, 1932, made and delivered a promissory note to the order of the Terrill Bond & Mortgage Co. for the sum of \$25,000, payable on September 29, 1932; that the Bond & Mortgage Co. endorsed and delivered the note for value to the National Builders Bank of Chicago, and that said Bank on October 4, 1932, delivered the note to plaintiff, directing that said sum of money be paid to him.

On the same day the declaration was filed plaintiff caused judgment by confession to be entered upon the note for the sum of \$26,366.15. On October 29th thereafter defendants entered a special appearance and moved the court to set aside the judgment upon the face of the record, which motion was denied.

November 4, 1932, after the expiration of the term at which the judgment was entered, defendants made a motion to open up the judgment and for leave to plead. In support of this motion they filed a verified petition setting up, as they claim, a meritorious defense to the whole of the demand. This motion was denied November 5th, and from that order this appeal has been perfected.

A copy of the note sued on and power of attorney upon which judgment was entered appear to have been attached to the declaration but have not been preserved by bill of exceptions and are not

R. V. BROWN,
Appellant.

vs.

THE MAX BROWN, ELLIOT BROWN,
JAMES BROWN, ELLIOT BROWN,
JAMES BROWN, ELLIOT BROWN,
JAMES BROWN, ELLIOT BROWN,
JAMES BROWN, ELLIOT BROWN,
Appellants.

271 I.A. 603

IN THE SUPREME COURT OF THE UNITED STATES
ON WRIT OF HABEAS CORPUS

Plaintiff herein on October 6, 1938, filed a declaration in this court, asking defendant in remission of the same in substance alleged that defendant on July 1, 1932, made and delivered a promissory note to the order of the plaintiff and wife for the sum of \$25,000, payable on September 30, 1933; that the Bank & Mortgage Co. endorsed and delivered the note for value to the National Builders Bank of Chicago, and that said bank on October 4, 1933, delivered the note to plaintiff, directing that said sum of money be paid to him.

On the same day the declaration was filed plaintiff caused judgment by confession to be entered upon the note for the sum of \$25,386.15. On October 20th thereafter defendant entered a special appearance and moved the court to set aside the judgment upon the face of the record, which motion was denied.

November 4, 1937, after the expiration of the term at which the judgment was entered, defendant made a motion to open up the judgment and for leave to plead. In support of this motion plaintiff filed a verified petition setting up, as true and correct, a declaration of the whole of the demand. This motion was denied November 25th, and from that order this appeal has been perfected.

A copy of the note and an end power of attorney upon which judgment was entered appear to have been attached to the declaration but have not been preserved by bill of exceptions and are not

therefore properly a part of the record. Davis v. Wirth, 249 Ill. App. 544; Davis v. Mosbacher, 252 Ill. App. 536; Alton Bank & Trust Co. v. Gray, 259 Ill. App. 20. The practice is different in the Municipal court of Chicago. Plew v. Board, 274 Ill. 232.

The affidavit filed in support of the motion must, under well established rules, be construed strictly against defendants. Great Western Hat Works v. Pride Hat Co., 224 Ill. App. 249; Sternberger v. Wright, 239 Ill. App. 490.

The affidavit avers that prior to March 30, 1932, defendants were trustees of the American Hospital of Chicago, which was a common law trust owning and controlling a certain hospital building and equipment therein in Chicago, of a value of more than \$250,000; that the Terrill Bond & Mortgage Company is a corporation engaged in the business of making loans secured by mortgages on real estate; that on March 30, 1932, plaintiff was the president of this company and owner of practically all of its stock, of which he was in control; that on the same date the common law trust was indebted to divers creditors in the sum of \$25,000 as the Bond & Mortgage Company and plaintiff knew; that prior to that time negotiations were had between the trust, acting through defendants, and the Mortgage Company, acting through plaintiff, looking toward a loan to the trust to be secured by a mortgage on its property; that pursuant to these negotiations, plaintiff as president wrote a letter to the American Hospital (which is set up verbatim in the affidavit) in substance proposing that the Mortgage company would make a loan of \$80,000, bearing interest at the rate of six per cent per annum, for which the company was to receive a commission of five per cent. The letter contains this clause:

"It is further understood upon the signing of the loan application and the signing of the bonds by your Trustee we will make an advance of \$30,000.00 less the 5% commission, the balance of the loan to be paid at stated intervals to be agreed upon and the total amount to be paid on or before ninety days from the date of the consummation of the loan."

The letter suggested that the trustees should advise the Bond company "promptly so our attorneys may prepare the proper papers." The affidavit avers that on January 25th thereafter the Hospital wrote the Bond company acknowledging receipt of this letter and stating in substance that at a special meeting of its Board of Trustees the loan had been "accepted according to the terms recited in your letter," and informed the Bond company that it might instruct its attorneys to proceed with the preparation of the necessary papers.

The affidavit also avers that by reason of this acceptance an agreement was consummated and that the hospital was thereafter at all times ready, willing and able to consummate the same; that the Bond company and plaintiff thereafter requested additional time; that on March 30, 1932, the company had failed to make the loan; that defendants then informed the Mortgage company that the creditors of the hospital were pressing and that the Trust was depending upon the proceeds of the loan; that the Trust would require an advancement on account of the proposed loan; that the Mortgage company, through plaintiff, stated at that time that plaintiff was unable to consummate the loan; that in consideration of the Trust allowing additional time in that respect the Company would advance to the Trust the sum of \$25,000; that the Company and plaintiff proposed to defendants that the Company would procure the same from the National Builders Bank of Chicago and advance the same to the Trust on account of the proposed loan; that in order to enable the Company to obtain funds from said bank, a note was to be executed by the Trust, by defendants as trustees; that it would be necessary to deposit collateral with the Bank, which the Company and plaintiff agreed to deposit, and that it would be necessary for defendants to guarantee payment of the note, in which guaranty the Company and the plaintiff would join.

The latter suggested that the insurance should be paid to the company "possibly to our attorney and through the latter to the hospital." The affidavit was made on January 10, 1932, in which the hospital wrote the bank company advising receipt of this letter and stating in substance that at a meeting of its board of trustees the loan had been "accepted according to the terms" stated in your letter, and that the bank company had it at that instant the attorney is proceeding with the preparation of the necessary papers.

The affidavit also avers that by reason of this acceptance an agreement was consummated and that the hospital was thereafter at all times ready, willing and able to consummate the same; that the bank company and plaintiff thereafter requested additional time; that on March 30, 1932, the company had failed to make the loan; that defendants then informed the mortgage company that the creditors of the hospital were pressing and that the Trust was depending upon the proceeds of the loan; that the Trust would require an advancement on account of the proposed loan; that the mortgage company, through plaintiff, stated at that time that plaintiff was unable to consummate the loan; that in consideration of the Trust allowing additional time in that respect the company would advance to the Trust the sum of \$20,000; that the company and plaintiff proposed to defendants that the company would purchase the same from the National Builders Bank of Chicago and advance the same to the Trust on account of the proposed loan; that in order to enable the company to obtain these two said bank, a note was to be executed by the Trust, by defendants as trustees; that it would be necessary to deposit collateral with the bank, which the company and plaintiff agreed to do so, and that it would be necessary for defendants to guarantee payment of the note, in which capacity the company and the plaintiff would join.

The affidavit alleges (apparently as the conclusion of defendants) that plaintiff requested defendants to sign the note solely as an accommodation to the Company and plaintiff, so that the Company and plaintiff could obtain \$25,000 from the Bank, which would then be advanced to the Trust on account of the proposed loan of \$80,000. The affidavit avers that it was agreed between defendants as trustees of the Hospital and the Mortgage company and plaintiff that liability upon the note would rest entirely upon the Company and plaintiff and not upon defendants or upon the Trust; that the note was to be considered purely as an accommodation to the Company and plaintiff; that as between defendants and the Company and plaintiff, the guaranty of defendants in their individual capacity was solely an accommodation guaranty to enable the Company and plaintiff to obtain the sum of \$25,000; that it was agreed that the trust would not be required to repay the sum but that the same would be deducted from the proceeds of the \$80,000 loan; that defendants as trustees executed the note and each in their individual capacity guaranteed the same; that there was deposited certain collateral to secure payment of the note, which collateral was entirely the property of the Company and of plaintiff; that said trust had no interest in the same; that the note was thereupon discounted by the Company and by plaintiff at the National Builders Bank of Chicago, and that the proceeds of the loan evidenced by the note were paid to the Company; that the proceeds of the note were advanced by the Terrill Bond & Mortgage Company to the common law trust as agreed; that the sum was to be applied upon the proposed first mortgage loan as agreed to between the parties; that the note fell due on July 1, 1932; that from March 30, 1932, to the maturity thereof defendants as trustees requested that the Mortgage company and plaintiff consummate the \$80,000 loan; that the Company and plaintiff requested further time within which to consummate said loan; that the loan was not con-

The affidavit alleges (apparently on the basis of 52-
Tendants) that plaintiff requested defendant to sign the note solely
as an accommodation to the company and plaintiff, so that the company
and plaintiff could obtain \$20,000 from the bank, which would then
be advanced to the Trust on account of the proposed loan of \$20,000.
The affidavit asserts that it was agreed between defendant as Trust-
tee of the Hospital and the Mortgage company and plaintiff that
liability upon the note would rest entirely upon the company and
plaintiff and not upon defendant as agent for the Trust; that the note
was to be considered purely as an accommodation to the company and
plaintiff; that as between defendant and the company and plaintiff,
the company of defendant in their individual capacity was solely
an accommodation guaranty to enable the company and plaintiff to
obtain the sum of \$20,000; that it was agreed that the Trust would
not be required to repay the sum but that the same would be deducted
from the proceeds of the \$20,000 loan; that defendant as Trustee
executed the note and each in their individual capacity guaranteed
the same; that there was deposited certain collateral to secure pay-
ment of the note, which collateral was entirely the property of the
company and of plaintiff; that said Trust had no interest in the
same; that the note was then and there assigned by the company and by
plaintiff as the National Builders Bank of Chicago, and that the
proceeds of the loan evidenced by the note were paid to the company;
that the proceeds of the note were advanced by the Trust and
Mortgage Company to the common law Trust as agreed; that the sum
was to be applied upon the proposed first mortgage loan as agreed
to between the parties; that the note fell due on July 1, 1934; that
from March 30, 1934, to the maturity thereof defendant as Trustee
requested that the Mortgage company and plaintiff continue the
\$20,000 loan; that the company and plaintiff requested further time
within which to consummate said loan; that the loan was not con-

summed upon maturity of the note, although defendants, as trustees, were at all times ready, able and willing to carry out the agreement.

The affidavit further alleges that upon maturity of the note on July 1, 1932, the Company and plaintiff requested additional time within which to consummate the loan of \$80,000; that upon their request, defendants as trustees, executed a renewal note dated July 1, 1932, and maturing ninety days thereafter, upon which this suit is brought; that at the time of the execution of the renewal note, the Bond & Mortgage company and plaintiff again agreed with defendants that the note was to be considered solely as an accommodation of the Company and plaintiff by the Trust; and that the Trust and defendants individually would not be liable thereunder; that the note should remain as a direct liability of the Bond & Mortgage Company and plaintiff, and that it was also agreed that the guaranty signed by defendants individually was to be deemed an accommodation guaranty for and on behalf of the Company and plaintiff, and that the collateral advanced by the Company and plaintiff to secure the original note was deposited by them to secure the renewal note.

The affidavit also avers that it was agreed between defendants as trustees and the Company and plaintiff that the note should be paid and discharged by the Company and plaintiff, and that defendants, as trustees, would be held harmless from liability thereon; that the money received on the original note was to be considered solely as an advance on the \$80,000 loan, and that the renewal note was executed by defendants as trustees and guaranteed by them as individuals upon that agreement; that defendants as trustees demanded of the Mortgage Company that it carry out the agreement, which it failed and refused to do; that when the renewal note matured September 29, 1930, it was paid by the Terrill Bond &

examined upon delivery of the note, although defendant, as trustee, were at all times ready, able and willing to carry out the agreement.

The affidavit further states that upon delivery of the note on July 1, 1932, the company and plaintiff requested additional time within which to reimburse the loan of \$20,000; that upon their request, defendant as trustee, executed a renewal note dated July 1, 1932, and retaining all other terms in effect, when this was so provided; that at the time of the execution of the renewal note, the loan was \$20,000 and plaintiff agreed with defendant that the note was to be considered solely as an accommodation of the company and plaintiff by the Trust; and that the Trust and defendant individually would not be liable thereunder; that the note should remain as a direct liability of the Bond & Mortgage Company and plaintiff; and that it was also agreed that the guaranty signed by defendant individually was to be deemed an accommodation guaranty for and on behalf of the company and plaintiff, and that the collateral provided by the company and plaintiff to secure the original note was deposited by them to secure the renewal note.

The affidavit also avers that it was agreed between defendant as trustee and the company and plaintiff that the note should be paid and discharged by the company and plaintiff, and that defendant, as trustee, would be held harmless from liability thereon; that the money received by the original note was to be considered solely as an advance on the \$20,000 loan, and that the renewal note was executed by defendant as trustee and plaintiff by them as individuals upon that agreement; that defendant as trustee represented of the company that it carried out the agreement, which it failed and refused to do; that when the renewal note matured December 20, 1932, it was paid by the Bond & Mortgage

Mortgage Company and plaintiff, in accordance with the agreement; but that instead of cancelling the note as they should have done, the Company and plaintiff took the note uncanceled and now seek to recover judgment thereon. The affidavit further avers that the payment of the note to the National Builders Bank of Chicago by plaintiff and the Company constitutes full payment and satisfaction of the note.

The question for decision is whether this affidavit, construing the same most strongly against defendants, states a defense. In view of the undisputed facts that defendants seem to have acted as trustees of a common law trust without any express agreement that the third persons would look to the funds of the estate exclusively, it would seem that they were personally bound as the makers of the note. Dunham v. Blood, 207 Mass. 512; Austin v. Parker, 317 Ill. 348; Schumann-Heink v. Folsom, 323 Ill. 321. Defendants do not seem to contend otherwise, but upon the theory that under the facts as stated in the affidavit the note was made for the accommodation of plaintiff and the Bond Company, they argue that a payment of the same by them would have the effect of discharging the instrument, and they cite authorities to the proposition that the accommodated party to a negotiable instrument has no right of recovery against the accommodating party. We understand this to be the law not only as settled by the decisions but now also by the positive provisions of the Negotiable Instruments act (Smith-Murd Ill. Rev. Stats. 1931, chap. 98, sec. 29) which defines an accommodation party as one who has signed the instrument as maker, drawer, acceptor, or endorser, "for the purpose of lending his name to some other person."

Notwithstanding the conclusions averred in this affidavit of merits, we think it is apparent, construing the affidavit strictly, as we must, that plaintiff did not assume any such relationship. In other words, notwithstanding the conclusions asserted it is apparent

Montague County, New York, in accordance with the agreement;
but that instead of cancelling the note as they should have done,
the County and Plaintiff took the note uncanceled and now seek to
recover thereon. The Plaintiff further says that the pay-
ment of the note to the National Builders Bank of Chicago by plain-
tiff and the County constitutes full payment and satisfaction of
the note.

The question for decision is whether this affidavit, con-
taining the same most strongly in favor of defendant, states a defense.
In view of the undisputed facts that defendant seems to have stated
as true in a sworn statement without any express agreement
that the third persons would look to the issue of the estate exclu-
sively, it would seem that they were personally bound as the makers
of the note. Winters v. Wood, 207 Mass. 512; Smith v. Parker, 217
Ill. 343; Commonwealth v. Wilson, 232 Ill. 321. Defendant does not
seem to contend otherwise, but upon the theory that under the facts
as stated in the affidavit the note was made for the accommodation
of plaintiff and the bond company, they claim that a payment of the
same by them would have the effect of discharging the instrument,
and they cite authorities to the proposition that the accommodated
party to a negotiable instrument has no right of recovery against the
accommodating party. We understand this to be the law not only as
settled by the decisions but also by the positive provisions of
the Negotiable Instruments Act (Smith-Burdett Law, State, 1901,
chap. 92, sec. 43) which reads an accommodation party as one who
has signed the instrument as maker, drawer, acceptor, or endorser,
"for the purpose of lending his name to some other person."
Notwithstanding the conclusions arrived at in this affidavit of
fact, we think it is apparent, considering the affidavit strictly,
as we must, that plaintiff did not assume any such relationship. In
other words, notwithstanding the conclusions arrived at in plaintiff's

that the money procured from the bank was not an advancement upon any real estate mortgage loan. Indeed, the averments of the affidavit distinctly show that no such final agreement for a real estate loan was made between the parties, no money was ever advanced on it, no bonds or mortgage were ever executed. Plaintiff contends that the arrangement by which \$25,000 was obtained was entirely separate and distinct from the transaction of the proposed loan which was to be secured by a real estate mortgage. While the parties may have had the real estate loan in contemplation at that time, the proposed agreement therefor was never consummated. If it had been it would at most have given to the hospital a right of action in which damages (if it had been possible to prove any) would have been unliquidated. It is perfectly apparent from the statements of the affidavit, that the hospital at no time complied with the requirements stated in the letter of the Bond & Mortgage Company dated January 23, 1932. Neither the hospital nor the defendants signed any loan application; they executed no bonds; they executed no trust deed. Indeed, the affidavit does not show that there was any tender of a trust deed or any bonds, nor does it allege that there was a merchantable title on which a real estate loan might have been predicated. The application to open up a judgment by confession is addressed to the equitable jurisdiction of the court. No facts appear here sufficient to cause the exercise of equitable powers. On the contrary, it clearly appears that these defendants owe a debt for which they have given their note and which upon every principle of justice and fair dealing they should repay.

We hold that the proposed \$80,000 real estate loan and the \$25,000 loan were separate and distinct transactions (Bevier v. Horn, 180 Ill. App. 547); that plaintiff was an accommodation endorser; that he is holder of the note in due course for value and is entitled

that the only interest that the bank was not an independent action
 my real estate mortgage loan. Indeed, the evidence of the affid-
 avit distinctly shows that no such effect was intended for a real estate
 loan was made between the parties, no money was ever advanced on it,
 no bonds or notes were ever executed. It is further stated that
 the arrangement by which the loan was obtained was entirely separate
 and distinct from the transaction of the proposed loan which was to
 be secured by a real estate mortgage. While the parties may have
 had the real estate loan in contemplation at that time, the proposed
 agreement insofar as it was never consummated. It is also stated
 at least have given to the plaintiff a right of action in which damages
 (if it had been possible to prove any) would have been minimized.
 It is further stated that the plaintiff's action is barred by the
 the plaintiff as no time elapsed from the date of the plaintiff's
 letter of the 10th of March 1908, until the 10th of May 1908, when
 the plaintiff for the defendant signed a loan application; they
 executed no bonds; they executed no promissory notes; the affir-
 avit does not show that there was any transfer of a loan fund or any
 bonds, nor does it allege that there was a negotiable bill ex-
 which a real estate loan might have been obtained. The application
 to open up a statement by evidence is admitted to be inadmis-
 sible at the court. It is further stated that the plaintiff's
 the exercise of equitable powers. In the context, it is clearly apparent
 that these defendants owe a debt for which they have given their note
 and which upon every principle of justice and fair dealing they should
 repay.

It is held that the proposed loan, no real estate loan and the
 \$25,000 loan were separate and distinct transactions. Shaw v. Rain,
 180 Ill. App. 247; that plaintiff was an accommodation endorser;
 that he is liable as the holder of the note in the absence of notice and is entitled

to recover. Horan v. Mason, 125 N. Y. S. 668; Lill v. Gleason, 142 Pac. 287, 92 Kan. 754; Graves v. Neeves, 183 Ill. App. 235. Moreover, plaintiff being a holder for a good and valuable consideration, parol evidence would not be admissible to vary the terms of the note. Faulner v. Gillam, 211 Ill. App. 348; Great Western Hat Works v. Pride Hat Co., 224 Ill. App. 249; Hinsdale State Bank v. Lytle, 262 Ill. App. 151.

For these reasons the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

to recover. Payson v. Mendenhall, 128 U.S. 471, 9 S. 2d 458; Mill v. Williams, 128 U.S. 458, 9 S. 2d 458. Payson v. Mendenhall, 128 U.S. 471, 9 S. 2d 458; Mill v. Williams, 128 U.S. 458, 9 S. 2d 458. Moreover, plaintiff owns a collar for a good and valuable consideration, and it is not probable that he would not be able to sell it for a good price. Payson v. Mendenhall, 128 U.S. 471, 9 S. 2d 458; Mill v. Williams, 128 U.S. 458, 9 S. 2d 458. Payson v. Mendenhall, 128 U.S. 471, 9 S. 2d 458; Mill v. Williams, 128 U.S. 458, 9 S. 2d 458.

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36531

FRANK SCHLEGEL and TERESA
SCHLEGEL,

Defendants in Error,

vs.

HENRY S. BANACH, ALPHONSO
BANACH and S. O. HOOVER,
Plaintiffs in Error.

54 7
ERROR TO SUPERIOR COURT

OF COOK COUNTY.

271 I.A. 603²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case for fraud and deceit the jury returned a verdict for plaintiffs in the sum of \$20,000, and upon motion for a new trial and plaintiffs' remittitur of \$10,000, the court entered judgment in the sum of \$10,000, which defendants seek to reverse by this writ of error.

The declaration was in one count which in substance charged that plaintiffs were the owners of a two-story eight apartment building in Chicago, worth over and above encumbrances \$16,000 and were possessed of money to the amount of \$2687.50; that defendants, who were real estate brokers, knowing that plaintiffs were ignorant concerning real estate and real estate mortgages, conspired together for the purpose and with the intention of cheating and defrauding plaintiffs; that to that end they proposed to plaintiffs that plaintiffs should trade the apartment building and money for a worthless junior mortgage of the face value of \$20,000. The declaration charged that defendants fraudulently and falsely represented that the owner of the junior mortgage was one Sophie Ward who was wealthy and a spendthrift, and that for the purpose of protecting her it was their desire to trade this junior mortgage for plaintiffs' building; that the mortgage was worth its full face value upon the market, and that it could be sold at any time for its full value; that it was like "gold in a pot," and that the maker of the mortgage was worth half a million dollars and had substantial personal wealth;

WALTER HENNINGSEN AND T. HENNINGSEN
Defendants in Error,

vs.

HENRY A. BROWN, ALLEGEDLY
BARNARD and S. O. BROWN,
Plaintiffs in Error.

ORDER TO RETURN WRIT

OF THIS COURT.

271 I.A. 603

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF FLORIDA

In an action on the case for fraud and deceit the jury

returned a verdict for plaintiffs in the sum of \$20,000, and upon
motion for a new trial and judgment, verdict of \$10,000, the
court entered judgment in the sum of \$10,000, which defendants
seek to reverse by this writ of error.

The allegation was in one count which in substance charged

that plaintiffs were the owners of a two-story eight apartment

building in Chicago, worth over and above encumbrances \$12,000 and
were possessed of money to the amount of \$2837.50; that defendants,

who were real estate brokers, knowing that plaintiffs were ignorant

concerning real estate and real estate mortgages, conspired to-

gather for the purpose and with the intention of cheating and de-

frauding plaintiffs; that to that end they proposed to plaintiffs

that plaintiffs should transfer the apartment building and money for a

workman junior mortgage of the full value of \$20,000. The deci-

sion was based upon defendants' fraudulent and false representation

that the owner of the junior mortgage was one Noble and who was

wealthy and a spendthrift, and that for the purpose of procuring

that it was their desire to transfer said junior mortgage to plaintiffs'

building; that the mortgage was worth the full face value upon the

market, and that it would be sold at any time for its full value;

that it was like "sold in a hot," and that the maker of the mortgage

was worth half a million dollars and had substantial personal wealth;

that his name on the paper was worth ten times the value of the mortgage itself, and that the real estate securing the mortgage was worth twice the face value of it.

The declaration averred that all of these representations were false and untrue and were made with the intention of procuring the apartment building and money of plaintiffs, and that by means thereof plaintiffs entered into a written agreement of exchange purporting to be with Sophie Ward, executed a warranty deed conveying the premises to one Marie J. Banach, and paid the sum of \$2650 to Henry S. Banach; that in making the exchange, attorney's fees, charges for pretended professional services of defendants as brokers and amounts on the principal of the junior mortgage were paid by plaintiffs, and that further conspiring, defendants caused a pretended sale of the junior mortgage to be held at which Henry S. Banach pretended to buy this mortgage for his own benefit; that thereafter the holder of the first mortgage foreclosed the rights of the junior holder, all to the damage of plaintiffs in the sum of \$35,000.

Defendants filed a plea of the general issue. There was a trial by jury and, as already stated, a final judgment in the sum of \$10,000 was entered against defendants and in favor of plaintiffs.

At the close of all the evidence there was a motion for a directed verdict in favor of defendants, which was denied. It is assigned and argued as error that the court refused to grant this motion for a directed verdict; that the court failed to give instructions requested by defendants, and that there was no proof of damages resulting from the alleged misrepresentations.

It is not contended, as we understand it, that there is no proof tending to establish the facts alleged in the declaration, but defendants insist that their instruction for a directed verdict should have been given for the reason that the representations upon

that his name on the paper was worth ten times the value of the mortgage itself, and that the bank would require the mortgage was worth twice the face value of it.

The Association advised that all of these representations were false and untrue and were made with the intention of procuring the apartment building on money of plaintiff, and that by means thereof plaintiff entered into a written agreement of exchange purporting to be with Joseph Park, executed a promissory deed conveying in the premises to one Marie J. Benson, and paid the sum of \$1000 to Henry J. Benson; that in making the exchange, plaintiff's fees, charges for pretended professional services of defendants as brokers and as such as the principal of the latter mortgage were paid by plaintiff, and that further consideration, defendants caused a pretended sale of the latter mortgage to be made at which Henry J. Benson pretended to buy this mortgage for his own benefit; that thereafter the holder of the first mortgage transferred the rights of the latter holder, all to the benefit of plaintiff in the sum of \$20,000.

Defendant filed a plea of the general issue, there was a trial by jury and, as already stated, a final judgment in the sum of \$10,000 was entered against defendants and in favor of plaintiff. At the close of all the evidence there was a motion for a directed verdict in favor of defendants, which was denied. It is admitted and argued on error that the court refused to grant this motion for a directed verdict; that the court failed to give instructions requested by defendants, and that there was no error of law resulting from the alleged misrepresentations. It is not contended, as we understand it, that there is no record tending to establish the facts alleged in the complaint. For defendant to insist that their instruction for a directed verdict should have been given for the reason that the representations made

which plaintiffs relied were not material. One of these representations was that the junior mortgage was owned by Sophie Ward, a very wealthy woman who was a spendthrift, and the reason for selling it was to keep her from squandering the money. Defendants say that neither the wealth of Mrs. Ward, nor her habits of spending, nor their desire to protect her therefrom, was material or would make any difference provided plaintiffs got good title to the junior mortgage. They cite a number of cases, such as Young v. Young, 113 Ill. 430; Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88; and Zalapi v. Holcomb & Hoke Manfg. Co., 241 Ill. App. 102, all of which in substance hold that to justify rescission of a contract by one of the parties to it on the ground that its execution was induced by false representations, it must be made to appear that the representations were material. Defendants also say that other representations proved on the trial were not actionable because they were only expressions of opinion as to the value of the mortgage. They say that it is well settled that such representations will not support an action for deceit, and they cite to the point Tuck v. Downing, 76 Ill. 71; Endsley v. Johns, 120 Ill. 469, and a large number of other cases.

It is urged further that in any event it appears that the representations were not relied on, because plaintiffs themselves examined the premises before the deal was consummated; and Billstrom v. Triple Tread Tire Co., 220 Ill. App. 550; Johnson v. Miller, 299 Ill. 276, and Mustad v. Cerny, 321 Ill. 384, are cited to this point.

It will be unnecessary to review these cases at length. They all state unquestioned rules of law where the parties to a transaction are dealing at arm's length and no fiduciary relationship exists. This present case is distinguished from all these cases in that here two of the defendants at least were acting as

brokers for plaintiffs and therefore owed a fiduciary duty to them.

A few of the many cases that might be cited which point out this distinction are Hank v. Brownell, 120 Ill. 161; Murry v. Dowd, 167 Ill. 368.

The other defendant, Henry S. Banach, had knowledge of the fiduciary duty of his codefendants and is therefore held to the same rule. Norris v. Taylor, 49 Ill. 17; Miller v. John, 208 Ill. 173; 12 Corpus Juris 538.

It is said that these representations were not proved to be false; that Sophie Ward was in truth a wealthy woman and a spend-thrift, and that the fact that the second mortgage became of substantially less value a few months after the date of the sale would not prove that it was not worth its face value at the time of the exchange or that defendants did not honestly and reasonably believe it to be worth its face value; that the representations as to the financial ability of the maker of the second mortgage, one Goraleski, were made in good faith and appeared to have been substantially true. However, all these matters were for the jury, which returned its verdict to the contrary, and we are not dissatisfied with the verdict.

It is further urged that there is no evidence in the record tending to show that defendants had knowledge of the falsity of the representations made by them. They either knew or ought to have known, and whether their representations show an intentional oversight of the truth or reckless disregard of whether their representations were true or false, they are liable.

It is urged that there is no evidence that plaintiffs were damaged, but it is clear that they lost their equity in the building

brokers for plaintiffs and defendant and a fiduciary duty to them.

few of the cases that might be cited which point out this distinction are York v. Brownell, 190 Ill. 181; Wright v. Dowd, 187 Ill. 388.

The other defendant, Henry G. Sarnack, had knowledge of the fiduciary duty of the defendants and is therefore held to the same rule. Hoyle v. Taylor, 121 Ill. 177; William v. John, 103 Ill.

173; 12 Corpus Juris 328.

It is said that these representations were not proved to be false; that to this end was in fact a wealthy woman and a wealthy man, and that the fact that the second mortgage became of such value as to make a few months after the date of the sale would not prove that it was not worth its face value at the time of the exchange of that date. It is not necessary and reasonably believe it to be worth its face value; that the representations as to the financial ability of the maker of the second mortgage, one Forbeski, were made in good faith and honestly to give them substantially true. However, all these matters were for the jury, which returned its verdict to the contrary, and we are not dissatisfied with the verdict.

It is further argued that there is no evidence in the record tending to show that the defendants had knowledge of the falsity of the representations made by them. They either knew or ought to have known, and whether their knowledge was an independent knowledge or the result of reliance on the statement of another their representations were true or false, they are liable.

It is urged that there is no evidence that plaintiffs were damaged, but it is clear that they lost their equity in the building.

and that the equity was of the value of \$16,000. The judgment entered is for only \$10,000.

It is urged that the court erred in refusing to instruct the jury, as requested by defendants, that the representations that Sophie Ward was a wealthy woman and a spendthrift and defendants were anxious to protect her, would not constitute legal fraud and that it did not make any difference whether Sophie Ward was the owner of the junior mortgage or not. What we have already said disposes of this contention.

Defendants also asked the court to instruct the jury to the effect that if plaintiffs had examined the property prior to the signing of the contract, defendants would not be liable in fraud. This contention also has been heretofore in substance considered by us and found inapplicable to this record.

It is also urged that the court erred in that it permitted the case to go to the jury without any instruction as to the rule by which damages were to be estimated. If defendants desired instructions along this line, the request should have been made to the court in the usual way.

We think there is no reversible error in the record, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

and that the equity was at the value of \$10,000. The judgment entered is for \$10,000.

It is urged that the court erred in refusing to instruct

the jury, as requested by defendant, that the representations that George had made were a warranty and a representation and defendant was entitled to protect him, would not constitute legal fraud and that it did not make any difference whether George was the owner of the latter mortgage or not. What we have already said disposes of this contention.

Defendant also asked the court to instruct the jury to the

effect that if plaintiff had examined the property prior to the signing of the contract, defendant would not be liable in fraud. This contention also has been mentioned in substance considered by us and found inadvisable to this court.

It is also urged that the court erred in that it permitted

the case to go to the jury without any instruction as to the rule by which damages were to be calculated. If defendant desired instructions along this line, his request should have been made to the court in the usual way.

We think there is no reversible error in the record, and

the judgment is therefore affirmed.

RECORDED.

O'Connor and Connolly, JJ., dissent.

36540

MILDRED S. BOOTH,
Appellee,

vs.

THE PRUDENTIAL INSURANCE CO.
OF AMERICA, a Corporation,
Appellant.

55 A
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

271 I.A. 603³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon a life insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of \$1106.26, upon which the court, overruling motions for a new trial and in arrest, entered judgment from which defendant appeals. At the close of all the evidence there was a motion by defendant for an instruction in its favor, which was denied, and it is contended in this court that the facts did not justify the verdict and further, that the court erred in giving certain instructions at the request of plaintiff and in permitting self-serving documents offered in behalf of plaintiff to be received in evidence over objection.

The policy in question was issued April 18, 1913, and the company thereby agreed to insure the life of Irene Shoukair for the sum of \$1000. Plaintiff, Mildred Shoukair Booth, is a daughter of the insured. There is practically no dispute as to the facts. February 25, 1914, the insured disappeared from her home and has ever since been absent therefrom. Plaintiff contends and defendant denies that the circumstances appearing in evidence are sufficient to raise a presumption of the death of the insured, and that the court under all the circumstances which appear in evidence could reasonably find that the insured as a matter of fact was dead prior to the beginning of this suit. Plaintiff filed a notice and made a claim against defendant under the policy on August 22, 1930. Payment was refused, and this suit followed. The facts concerning the

WILLIAM A. KROGER,
Attorney at Law,

vs.

THE INDIAN INSURANCE CO.
OF INDIANAPOLIS, A CORPORATION
OF INDIANA.

SPECIAL AGENT IN CHARGE
OF CASE NO. 100.

200 A. 1. 1. 3

IN THE CIRCUIT COURT OF THE STATE OF INDIANA,
SOUTHERN DISTRICT.

In an action in assumpsit upon a life insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of \$100.00, upon which the court, overruling motions for a new trial and in arrest, entered judgment from which defendant appeals. At the close of all the evidence there was a motion by defendant for an instruction in its favor, which was denied, and it is contended in this court that the trial was not fairly and equitably conducted and that the court erred in giving certain instructions at the request of plaintiff and in permitting self-serving documents to be in view of plaintiff to be received in evidence over objection.

The policy in question was issued April 18, 1917, and the company therein agreed to insure the life of Irene Schuchter for the sum of \$100.00. Plaintiff, married Hannah Schuchter, is a daughter of the insured. There is absolutely no dispute as to the facts.

February 20, 1914, the insured disappeared from her home and has ever since been absent without return. Plaintiff contends and defendant denies that the circumstances appearing in evidence are sufficient to raise a presumption of the death of the insured, and that the court erred in all the circumstances which appear in evidence and reasonably find that the insured as a matter of fact was dead prior to the making of this suit. Plaintiff filed a notice and made a claim against defendant under the policy on August 27, 1920. Payment was refused, and this suit followed. The facts concerning the

absence of the insured, or which the jury could reasonably find to be established by the evidence, appear to be as follows:

The insured was an American born woman of English extraction; her maiden name was Ferner; she married David Hassan Shoukair, a Syrian by nativity, who came to Chicago during the World's Fair in 1893. The family home was at 4538 Lake Park avenue, Chicago. Six children were born of the marriage, the oldest of whom was plaintiff, who at the time of the disappearance of her mother was eighteen years old. The youngest child was ten years old. The mother was about forty years old and the father about four years older. The father was an importer and cleaner of oriental rugs and conducted his business at 1219 East 47th street, at 1361 East 47th street, and at a factory at 4540 Cottage Grove avenue; he was an expert on rugs, the mother on laces. The business seems to have prospered and the family was in good financial condition; they kept a servant at home; the mother worked hand in hand with the father at the business. Plaintiff at this time was attending a business college and the younger children were all going to school. The father usually went to his business about eight o'clock in the morning, and the mother went to it after the children were off to school; she kept the books of the business.

Sometimes the husband and wife would remain at the store until twelve o'clock at night. In addition to her work in the business the insured did sewing for the entire family. Plaintiff could not remember that her mother ever took any extended vacation. The business required practically all of her time and left little, if any, time for pleasure or recreation. Her mother said to her before leaving that she was in need of a rest and on several occasions spoke of taking a trip to California. When she disappeared she took a complete wardrobe, at least \$100 in cash, and jewelry consisting of watches, bracelets, and fourteen diamond rings. At

absence of the family, as when the lady could remember that in
 the celebration of the marriage, and so on in the following:
 The family was an American born woman of English extraction;
 her mother's name was "John"; the married name was "John";
 a typical English name, and even to which she had been born;
 in 1850. The family name was as above said, the name, Chicago.
 His children were born in the city, the oldest of whom was
 "Elizabeth", who at the time of the marriage was of her mother was
 eighteen years old. Her youngest child was ten years old. The wife
 was about thirty years old and her husband about four years older.
 The father was an American and a member of the American Church and con-
 sidered his business as that of a merchant, at that time. He was an
 active, and at a factory at the time of the marriage; he was an
 expert on paper, the paper on paper. The business seems to have
 prospered and the family was in a comfortable position; they had
 a servant at home; and neither of them had any other children at
 the time. Elizabeth at the time was attending a business col-
 lege and the youngest child was all alone to school. The father
 usually went to his business about eight o'clock in the morning, and
 the mother went to it after the children were off to school; she
 kept the house of the family.
 Elizabeth was a student and with some friends of the same
 until twelve o'clock at night. In addition to her work in the
 business she finished and worked for the entire family. Elizabeth
 could not remember how long it was that she was attending business
 the business required practically all of her time and her father,
 if any, also the business in connection. Her mother went to her
 before leaving that she was in need of a trust and her several thou-
 sand dollars of money to go to California. She was disappointed
 and took a small amount, at least \$1000 in cash, and jewelry
 consisting of watches, bracelets, and diamond and pearls.

the time of her disappearance she left four notes, one of which was addressed to plaintiff. The original had been destroyed, but a copy, which is in evidence, is as follows:

"My Dear Mildred: I am writing you these few lines to say good-bye for some time -- I do not know for how long. Be a good, dear girl; stick to what you are doing, and you will make a good, successful woman. Be good to the rest of the 'kids' and don't get so angry about little things; they are not worth while.

I suppose you did not think I meant what I said when I told you all how I felt, but this is the way of life; things do turn out so. I have not been a bit contented, and as I wanted no fuss, I thought this would be the only way to do.

Look after grandma a little bit and sort of look after the store. You know all about the goods on consignment; there will be enough money coming in to pay for the few little things I have sold.

Be a good girl and be happy. Don't worry about me. Everything is O. K. I will write to you. Don't fuss about everything.

Be a good girl, and if papa makes much of a fuss, try to calm him down; he will get over it in a few days.

Tell everybody I am away for a rest, to visit some friends, and don't say too much about anything to anybody. With love and kisses, I am, your

Mamma."

The husband, David H. Shoukair, had a cousin named Sam Bahmed, who sometimes visited at the home and who was about eighteen years of age. He disappeared at about the same time that Mrs. Shoukair left, and comment was made on this fact by their mutual friends. Some of the closest friends evidently thought that the mind of the mother had been affected. All the testimony is to the effect that there had been no serious marital trouble such as would cause her to disappear. In 1916 the father obtained a divorce (plaintiff says, most reluctantly and upon her insistence.) The father died in 1919 leaving a will, and in 1921 the estate recovered insurance made payable in the policies to the mother upon the theory that she was dead. Shortly after the disappearance the father caused an advertisement to be inserted in the Chicago Daily Tribune, "Myrtle down with diptheria, Dave," to which there was no response. The father was well known among the oriental traders and by Syrians all over the country, and the Syrians in this country generally knew of the disappearance of the wife and mother.

One of Mrs. Shoukair's closest friends, a Mrs. Harris, tes-

the time of her disappearance she left four notes, one of which was addressed to plaintiff. The original had been destroyed, but a copy, which is in evidence, is as follows:

"My dear Richard: I am writing you these few lines to say good-bye for some time - I do not know for how long. Be a good, dear girl; stick to what you are doing, and you will make a good, successful woman. Be good to the rest of the 'X's' and don't get so angry about little things; they are not worth while. I am sure you did not think I meant what I said when I told you all how I felt, but this is the way of life; things to turn out so. I have not been a bit concerned, and as I wanted to know, I thought this would be the only way to be. Look after yourself a little bit and part of it will after the store. You know all about the goods on consignment; there will be enough money coming in to pay for the little things I have said. Be a good girl and be happy. Don't worry about me, very-thing is O. K. I will write to you. Don't lose about anything. Be a good girl, and if you make much of a mess, try to calm him down; he will get over it in a few days. Tell everybody I am away for a week, to visit some friends, and don't say too much about anything to anybody. With love and kisses, I am, your

Margaret

The husband, David L. Shunk, had a cousin named Sam Shunk, who sometimes visited at the store and who was about eighteen years of age. He disappeared at about the same time that Mrs. Shunk left, and sometime was made on this fact by David Shunk's friends. None of the closest friends evidently thought that the kind of the mother had been affected. All the testimony is to the effect that there had been no serious marital trouble and no real cause for the disappearance. In 1913 the father obtained a divorce (plaintiff says, not voluntarily and upon her instigation). The father died in 1913 leaving a will, and in 1913 the estate recovered insurance made payable to the estate to the mother upon the life of that she was dead. Shortly after the disappearance the father caused an advertisement to be inserted in the Chicago Daily Tribune, "Myrtle born with epileptic, have," to which there was no response. The father was well known among the retail traders and by Myrtle all over the country, and the Tribune in this country generally knew of the disappearance of the girl and mother. One of Mrs. Shunk's closest friends, a Mrs. Lattie, had

tified that shortly before the disappearance of Mrs. Shoukair they lunched together downtown; that Mrs. Shoukair then told her that she was going away to get a rest and vacation, which she had not had for many years, and that she at that time mentioned California as the place to which she might go and said that an elderly lady friend might go with her, that she would not be gone long, that she would probably write to her (the witness) and would write to the children. Mrs. Harris never heard from her nor have any of the children.

The insurance policy was discovered by a brother of plaintiff in going through a desk in 1930, and this by way of explanation indicates that the destruction of the letter by Mrs. Shoukair to her daughter was not an intentional spoliation.

Kamel H. Mahmed, a brother of Sam Bahmed, testified that he remembered the time of the disappearance of his aunt; that he was then employed by Sears Roebuck & Co.; that she called him on the 'phone and said, "Good-bye;" that he wished to persuade her to stay but she said, "No, I am going. I have only three minutes to catch my train." He said that this was a couple of months after his brother left, and that he has not heard from his brother since that time.

The foregoing is in substance the testimony received. Defendant argues that mere absence, no matter how long continued, does not raise a presumption of death, and that when the reasons for the leaving and long continued absence are known and explained, no presumption of death arises at the end of seven years or at any other time. It is urged that the circumstances under which Mrs. Shoukair disappeared show that the disappearance was intentional; that under the circumstances she would not naturally communicate with her family and friends, and that in such case the law does not raise any presumption that she died at the end of seven years or at any other time.

children. Mrs. Katie never knew how far away she would properly write to her (she wished) and would write to the friends who were with her, that she would not be long, that she was going to which she said that an elderly lady had for many years, and that she of course had remained faithful to her way of life and devotion, when she had not intended to get her down; that Mrs. Thackeray then told her that she had never before the large number of her, and that she

to her daughter was not an intentional spoliation.

James H. Mahand, a brother of Sam Mahand, testified that he remembered the time of the disappearance of his aunt; that he was then employed by John Mahand & Co.; that one called him on the phone and said, "Good-bye"; that he wished to persuade her to stay but she said, "No, I am going. I have only three minutes to enter my train." He said that this was a couple of months after his brother left, and that he has not heard from his brother since that time.

[illegible]

We do not understand the law to be that in order to raise a presumption of death upon a disappearance of this kind it is necessary to show an intention to return. While there is language in Kennedy v. Modern Woodmen of America, 243 Ill. 560, and Gayton v. Equitable Life Assurance Society, 245 Ill. App. 432, which might be so construed, we held in Piersol v. Massachusetts Mut. Life Ins. Co., 260 Ill. App. 578, after reviewing those cases that it was not necessary to show such intention. We said there:

"An examination of the cases indicates that the prerequisites which would justify a presumption of death are (1) that the person whose death is in question has disappeared from his last known abode, domicile or residence; (2) that he has neither returned thereto nor communicated with those with whom he would naturally communicate if alive; (3) that inquiry has been made at the last known place of abode of the persons who would naturally hear from him without obtaining information indicating that he is alive. Out of proof of such material facts a presumption of death arises as a matter of law, but it is a rebuttable presumption which may be disproved by evidence of facts tending to show that the party presumed to be dead is alive."

We think that opinion states the essential elements which must be proved in order to raise a presumption of death, although, as is there stated, this is a presumption which is rebuttable, and it is for the jury under all the evidence to say whether or not the fact of death has been established. Under all the circumstances, we think the question here was for the jury.

Defendant also contends that instructions given by the court for plaintiff were erroneous because they were predicated upon the assumption that the mere absence of the insured for more than seven years raised a presumption of death without reference to the absence being explained or unexplained, and Gayton v. Equitable Life Assurance Society, 245 Ill. App. 432, and Piersol v. Mass. Mutual Life Ins. Co., 260 Ill. App. 578, are cited. We have examined the instructions and do not find them subject to this objection.

There is no reversible error in the record, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

we do not understand the law to be that in order to raise

a presumption of death upon a disappearance of this kind it is

necessary to show an intention to return. While there is language

in Kennedy v. Roberts, 200 Ill. 230, and Roberts v.

Waukegan Life Insurance Society, 215 Ill. App. 438, which might

be so construed, we hold in Roberts v. Waukegan Life Ins.

Soc., 240 Ill. App. 578, after stating, "It was not

necessary to show such intention. We said there:

"An examination of the cases indicates that the presumption which would usually be drawn from the fact that a person whose death is in question has disappeared from the last known place, definite or indefinite; (2) that he was not returned there nor communicated with since that time would naturally presume that he is alive; (3) that inquiry has been made at the last known place of abode of the person who would naturally bear from him without obtaining information indicating that he is alive. Out of proof of such material facts a presumption of death arises as a matter of law, but it is a rebuttable presumption which may be disproved by evidence of facts tending to show that the party presumed to be dead is alive."

We think that opinion states the essential elements which must be

proved in order to raise a presumption of death, although, as it

there stated, this is a presumption which is rebuttable, and it is

for the jury under all the facts to say whether or not the fact

of death has been established. Under all the circumstances, we

think the question here was for the jury.

Reversed and remanded with instructions given by the court.

For plaintiff were attorneys Messrs. Day & Gendron, and for the

defendant that the facts above are of the nature that have been

examined and a presumption of death without reference to the evidence

being examined or understood, and Roberts v. Waukegan Life Insur-

ance Society, 215 Ill. App. 438, and Roberts v. Waukegan Life Insur-

ance Soc., 240 Ill. App. 578, are cited. We have examined the in-

structions and do not find them subject to this objection.

There is no reversible error in the record, and the judgment

is hereby affirmed.

Conceder and secondly, 411, second.

36571

B. A. ALBERT,
Appellee,

vs.

LIBERTY TRUST AND SAVINGS
BANK, a Corporation,
Appellant.

56
7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

271 I.A. 603⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff, Albert, sued defendant bank alleging that on September 26, 1932, he drew a check on his account in the bank to the order of one Fitzgerald for \$612, which defendant wrongfully refused to pay. Plaintiff filed the common counts.

Defendant filed an affidavit of merits denying that plaintiff had a checking account with the bank; that the bank was under any obligation to honor the check; that it had unlawfully refused to make payment on plaintiff's check, or that it was liable to plaintiff under the common counts.

There was a trial by the court with a finding for plaintiff and judgment thereon for \$612, which this court is asked to reverse.

The principal contention of defendant is that the court erred in its rulings upon receiving and rejecting evidence and in its construction and interpretation of certain writings executed by the parties. The evidence shows that plaintiff prior to August 24, 1932, had an account with defendant bank, and that plaintiff deposited \$612 in it, against which amount he drew his check. Defendant, however, refused to pay the check, having applied this deposit on a note of plaintiff which by its terms was past due. Defendant contends and plaintiff denies that the bank might lawfully do this, and this seems to be the nub of the controversy.

The evidence shows that on January 14, 1932, plaintiff executed and delivered to defendant bank his promissory note of that date, payable to its order, for the sum of \$3627.95, due six months after

ALBERT, ALBERT,
 Defendant.
 ALBERT, ALBERT,
 Plaintiff.

STATE OF CHICAGO,
 COUNTY OF COOK.

2000

IN SENATE
 DELIVERED THE CLERK OF THE COURT

Plaintiff, Albert, does hereby certify that on

September 28, 1932, he drew a check on his account in the bank to the order of one defendant for \$100, which defendant promptly returned to pay. Plaintiff filed the check.

Defendant filed an affidavit of merit saying that plaintiff had a checking account with the bank; that the bank was under any obligation to honor the check; that it had unwillingly refused to make payment on plaintiff's check, or that it was liable to plaintiff under the common counts.

There was a trial by the court with a finding for plaintiff and judgment thereon for \$100, which said court is asked to reverse. The principal contention of defendant is that the court erred in its rulings upon receiving and rejecting evidence and in its construction and interpretation of certain writings executed by the parties. The evidence shows that plaintiff prior to August 14, 1932, had an account with defendant bank, and that plaintiff deposited \$100 in it, against which amount he drew his check. Defendant, however, refused to pay the check, having applied this deposit as a note of plaintiff's debt to the bank and not as a cash payment. Defendant and plaintiff agreed that the bank might lawfully do this, and this seems to be the law of the country. The evidence shows that on January 11, 1932, plaintiff executed and delivered to defendant bank his promissory note of that date, payable to its order, for the sum of \$200.00, due six months after

date, with interest at six per cent per annum after due until paid. The note recites that the maker has deposited with the bank as collateral security "for the payment of this or any other liability or liabilities of the undersigned," to the holder, due or to become due, or that might thereafter be contracted or existing, an "assignment dated January 14, 1932, of B. A. Albert, relating to one-half of his interest in any and all proceeds to become due him under Trust Agreement dated January 22, 1926, and known as Liberty Trust & Savings Bank Trust No. 770;" and also "note signed by Liberty Trust & Savings Bank, as Trustee under its Trust No. 1175, and not individually, dated January 2, 1932, due February 2, 1937, in principal sum of \$4,000.00, 6% interest payable February and August 2nd of each year, secured by Trust Deed of even date to Herman Waldman, Trustee."

The note contains the usual clauses giving the bank the right to call for additional security and full power and authority to the legal holder to sell, transfer, assign and deliver the whole of the property, at its option, with or without advertisement or notice, and after paying expenses to apply the residue of the proceeds to the payment of "either or all of said liabilities;" further, that in case the collaterals are insufficient to pay principal, interest, costs, attorney's fees and expenses, the maker should pay to the legal holder the deficiency forthwith with interest.

It further provides: "And said bank, or its assigns, is hereby authorized to apply upon this note, or upon such deficiency, any money or other property in the possession of said bank or its assigns, belonging to the undersigned, or any or either of them. Said collateral, or any part thereof, and the proceeds of the sale thereof, or any part thereof, shall be applicable to any other note or claim, whether due or not, held by the said bank or its assigns,

late, with interest at six per cent per annum after due notice paid.
 The note recites that the money was deposited with the bank as a
 lateral security "for the payment of note or any other liability
 or liability of the undersigned," to the holder, due or to become
 due, or that should hereafter be contracted or existing, an "assignment
 was dated January 11, 1937, of J. A. Albert, holder, to one-half
 of his interest in and over all proceeds to become due him under
 Trust Agreement dated January 22, 1937, and known as Liberty Trust
 & Savings Bank Trust No. 770," and also "note signed by Liberty
 Trust & Savings Bank, as trustee under the Trust No. 117, and not
 individually, dated January 7, 1937, due January 8, 1937, in principal
 sum of \$4,000.00, of interest payable quarterly and interest and of
 each year, secured by first trust deed in even date to certain persons,
 trustees."

The note contains the usual clauses giving the bank the right
 to call for additional security and full power and authority to the
 legal holder to sell, transfer, assign and deliver the whole of the
 property, as its option, with or without advertisement or notice, and
 after paying expenses to apply the proceeds of the proceeds to the
 payment of "first or all or any liability," further, that in
 case the said estate is indebted to pay principal, interest,
 costs, attorney's fees and expenses, the money should pay to the
 legal holder and his assigns with interest.

It further provides: "and said bank, or its assigns, is
 hereby authorized to apply upon this note, or upon such delivery,
 any money or other property in the possession of said bank or its
 assigns, belonging to the undersigned, or any or either of them,
 said collection, or any part thereof, and the proceeds of the sale
 thereof, or any part thereof, shall be applicable to any debt or
 claim, whether due or not, held by the said bank or its assigns."

against the undersigned, or any or either of them **."

The note provides that the makers, endorsers and guarantors severally waive demand, protest and notice of non-payment. It contains a joint and several power of attorney to confess judgment in favor of the legal holder for "as much as may be due according to the tenor and effect of said note, with interest thereon," and to waive and release errors, etc.

The note is a printed form, and at the end of the printing the following clause is inserted in typewriting: "Payment of the within collateral note, or any renewal or extension thereof, is to be made in accordance with the terms of the above mentioned assignment of E. A. Albert to Liberty Trust & Savings Bank." The note shows endorsements before and after maturity of various amounts as representing part payments on the note.

The assignment referred to was received in evidence and is as follows:

"For Value Received, I hereby assign, transfer, and set over unto the Liberty Trust & Savings Bank, one-half of any and all proceeds to become due me under and by virtue of a certain Trust Agreement dated the 22nd day of January, A. D. 1926, and known as Liberty Trust & Savings Bank Trust No. 770, with the understanding that said proceeds is to apply on account of payment of a certain collateral note dated January 14, 1932, in the principal sum of \$3627.95, and interest, as evidenced by said note which has been executed by E. A. Albert.

"It is further understood that this assignment, and the monies to be received thereunder, is to be applied upon any renewal and/or extension of said collateral note.

"Dated at Chicago, Illinois, this 14th day of January, A. D. 1932.

E. A. Albert.

"ACCEPTANCE

We accept the foregoing assignment, subject to all of the provisions of said trust agreement.

LIBERTY TRUST & SAVINGS BANK,
Wm. Kabaker
Asst. Cashier.

"TRUSTEE'S ENDORSEMENT.

The Liberty Trust & Savings Bank, as Trustee under its Trust No. 770, hereby acknowledges receipt of the foregoing assignment this 14th day of January, A. D. 1932.

LIBERTY TRUST & SAVINGS BANK,
As Trustee,
By E. Levinson,
Trust Officer."

Upon the trial plaintiff undertook to show by oral conversations said to have taken place just prior to or contemporaneous with the execution of the note, that the abovementioned typewritten sentence was placed upon the note for the purpose of manifesting the intention of the parties that the note should be paid exclusively out of the proceeds of the assignment. Plaintiff, over objection, was permitted to state: "It was absolutely understood and discussed that no other funds of any kind would be used to pay that note and that finally I agreed to do this and put it on the note. Otherwise, I would never have turned over the mortgage. The note was signed after the endorsement was put on and agreed that that would be the understanding and arrangement." The motion on the part of defendant to strike out this and similar evidence was denied, and an offer by defendant to show the amount of indebtedness due upon the note on August 5, 1932, was excluded - apparently upon the theory that it was wholly immaterial.

It is apparent that the finding of the court was based upon the parol evidence. That parol evidence of conversations had contemporaneous with or prior to the execution of integrated written documents is generally inadmissible to vary the terms thereof, is elementary and scarcely needs the citation of authorities. Sterling Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, is a recent case illustrative of the rule. Also, the note, the assignment and the typewritten sentence should be construed together, and if possible every clause, phrase and word in the integrated writing should, if possible, be given a meaning. Weger v. Robinson Nash

"LAWYER'S RESPONSIBILITY"

The liberty trust a savings bank, as trustee under its trust agreement, hereby solemnly swears that the following assignment was made to it by the said savings bank, on the 14th day of January, A. D. 1932.

LIBERTY TRUST A SAVINGS BANK,
as Trustee,
By W. H. Davidson,
Trust Officer.

Upon the trial plaintiff undertook to show by oral conversation that the defendant had placed just after the conversation with the execution of the note, that the assignment was written sentence was placed upon the note for the purpose of maintaining the intention of the parties that the note should be paid exclusively out of the proceeds of the assignment. Plaintiff, ever diligent, was permitted to state: "It was absolutely understood and discussed that no other funds of any kind would be used to pay that note and that finally I agreed to do this and put it on the note. Otherwise, I would never have turned over the mortgage. The note was signed after the assignment was put on and agreed that that would be the understanding and arrangement." The action on the part of defendant to attack this assignment evidence was taken, and an offer by defendant to show the words of interested parties upon the note on August 9, 1932, was excluded - apparently upon the theory that it was wholly immaterial.

It is apparent that the theory of the court was based upon the oral evidence. That oral evidence of conversations had conversations with or prior to the execution of interest written documents is generally inadmissible to vary the terms thereof, in elementary and secondary facts the situation of commercial, Midland Coal Co. v. West 104 Cal. 2d 111, 1934, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Motor Co., 340 Ill. 81; Green v. Ashland State Bank, 346 Ill. 174, are cases illustrating this well settled rule of interpretation. It is also apparent that the note and the assignment should be construed as a single contract, since the two instruments were executed at the same time and as a part of the same transaction. Home Ins. Co. v. Favorite, 46 Ill. 263; Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21. See also Restatement of the Law of Contracts, sections 237 to 244.

Interpreting the assignment, the note and this typewritten endorsement as a single document, we do not find any ambiguity which would render the parol evidence rule inapplicable. There is not a word in the writings when thus construed, together, which would justify the interpretation which plaintiff suggests, either that the collateral security must be exhausted before any other funds of the debtor could be applied upon the indebtedness or upon a deficiency, or that the promise of payment in the note is conditional and the note payable only out of the specific funds which might be derived from the assignment. An interpretation of the latter kind is rendered quite impossible by the fact that in addition to the assignment which was pledged as collateral, plaintiff also pledged a mortgage note for \$4000, secured by a trust deed. It follows, of course, that the court erred in receiving over objection parol evidence which would contradict the express terms of the note, and in rejecting the evidence offered by defendant disclosing the amount which was due upon the note at the time plaintiff's account was appropriated for the payment of it. Indeed, the collateral note expressly grants to the holder of it the right to charge to plaintiff's account the principal, interest, etc., when the same should become due and payable.

Plaintiff also insists that defendant did not preserve the questions raised for review because the record does not disclose

Major G. C. 340 111. 61; Reed v. American State Bank, 340 111. 171.
 are cases illustrating this well settled rule of interpretation.
 It is also important that the note and the assignment should be
 construed as a single contract, since the two instruments were
 executed at the same time and as a part of the same transaction.
Home Ins. Co. v. American, 340 111. 335; Leitch Corporation v. State 340
v. 171, 111. 335. It was also held in the case of
Contract, section 277 to 281.
 Interpreting the assignment, the note and this typewritten
 instrument as a single document, we do not find any ambiguity
 which would render the parol evidence rule inapplicable. There is
 not a word in the writing which is contradicted, explained, or
 would justify the introduction of extrinsic evidence, either
 that the collateral security was to be returned before any other
 funds of the debtor could be applied upon the indebtedness or
 upon a deficiency, or that the promise of payment in the note is a
 condition of the note payable only at the maturity of the
 note which might be delayed from the assignment. An interpretation of
 the latter kind is rendered also impossible by the fact that in
 addition to the assignment which was filed in the court, plain-
 tiff also filed a mortgage dated 12-14-00, secured by a first
 deed. It follows, of course, that the court tried in receiving
 over objection parol evidence which would nullify the mortgage
 terms of the note, and in rejecting the evidence offered by de-
 fendant insisting the amount upon which the note was due at the
 time plaintiff's account was represented for the payment of it.
 Indeed, the collateral note created by Grant is the basis of it
 the right to charge to plaintiff's account the principal, interest,
 etc., then the same would become due and payable.
 Plaintiff also insists that defendant did not reserve the
 questions raised by the note because the record does not disclose

any exception taken to the overruling of motions for the arrest of judgment and for a new trial, and cites a number of authorities such as Climax Tag Co. v. American Tag Co., 234 Ill. 179; Mayville v. French, 246 Ill. 434, which held that an exception to the ruling is essential to a review. This is not the law since the amendment of section 81 of the Practice act (Smith-Hurd's Ill. Rev. Stats., chap. 110, sec. 81). See Miller v. Anderson, 269 Ill. 607, and the cases following that decision.

For the errors already considered the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

GENERAL RADIUM INSTITUTE, INC.,)
a Corporation,

Appellee,

vs.

COMMERCE CASUALTY COMPANY,
a Corporation,

Appellant.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

271 I.A. 603⁵

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action in contract on a bond and upon trial by the court, there was a finding for plaintiff in the sum of \$281.46, on which the court entered judgment which we are asked to reverse.

The bond in question was executed August 22, 1931, and by its terms the Commerce Casualty Co. agreed in consideration of the premium to pay to plaintiff, described in the bond as the employer, within thirty days after proof, such pecuniary loss "as the Employer shall have sustained by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed after the date hereof by Frank Deacon (hereinafter called the 'Employee')" etc. At the time of the execution of this bond Frank Deacon was the president and treasurer of the North Chicago Hospital. The hospital and plaintiff had entered into an agreement in writing, which provided that plaintiff should place in the hospital an X-ray laboratory, which the hospital was given the option of purchasing during the period of the contract - three years. The contract also provided that plaintiff agreed to pay to the hospital twenty per cent on the gross income from the laboratory on the first \$1000 and then on the basis of a sliding scale up to thirty per cent on the gross collected income in excess of \$3000 a month. The hospital agreed to account to plaintiff for all moneys collected from the business of the X-ray laboratory and to insure plaintiff protection for all moneys so collected, and the hospital

281 I.A. 603

GENERAL RADIO LABORATORY, INC.,
a Corporation,
Appellee,
vs.
COMMONWEALTH LABORATORY,
a Corporation,
Appellant.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS
JULY 1934

In an action in contract on a bond and upon trial by the
court, there was a finding of liability in the sum of \$100.00,
on which the court entered judgment which was asked to reverse.
The bond in question was executed August 23, 1931, and by
its terms the Commonweath Laboratory Co. agreed in consideration of the
premium to pay to plaintiff, described in the bond as the employer,
within thirty days after birth, even pecuniary loss "as the employer
shall have sustained by any act or acts of fraud, dishonesty, for-
gery, theft, embezzlement, wrongful abstraction or other dishonest
action committed after the birth of the child by or with the assistance
called the 'employee'." etc. At the time of the execution of this
bond Frank Johnson was the president and treasurer of the latter
Chicago hospital. The hospital and plaintiff had entered into an
agreement in writing, which provided that plaintiff should place
in the hospital as a day laboratory, which the hospital was given
the option of purchasing during the period of the contract - three
years. The contract also provided that plaintiff agreed to pay to
the hospital twenty per cent of the gross income from the laboratory
on the first three years and on the basis of a sliding scale up to
thirty per cent on the gross collected income in excess of \$1000 a
month. The hospital agreed to assume to plaintiff for all money
collected from the business of the day laboratory and to insure
plaintiff protection for all money so collected, and the hospital

agreed to furnish the surety bond for \$5000 covering the treasurer of the hospital, cost of the bond to be defrayed by plaintiff. The bond was apparently executed pursuant to the provisions of this contract.

The evidence shows that plaintiff did business with the hospital from June 30, 1931, until it went into the hands of a Federal receiver about March 29, 1932. During that time plaintiff performed services according to the contract for the North Chicago Hospital. Partial payments were made according to the terms of the contract, from time to time, and there is now due to plaintiff a balance of \$251.46, which is still unpaid.

The evidence further shows that Mr. Tweed, president of the plaintiff institute, had a conversation with Dr. Deacon November 13, 1931, in which Dr. Deacon said that he did not then have the money to pay what was due, but that from that date he would permit plaintiff to keep 100% instead of 80%, which it was entitled to under the contract, and credit the other 20% on the back account, and this was done from that date up to the time the hospital was taken over by the Federal receiver.

There is no dispute that the balance of \$251.46 is due to plaintiff and has not been paid. Mr. Tweed testified that there was no definite time set for the hospital and plaintiff institute to render accounts to each other; that sometimes the collection was made monthly but later on it was made every day; that up to the time the bond was in effect monthly statements were rendered; that the petition for bankruptcy against the hospital was filed September 18, 1931, and the hospital was behind in its payments at that time - by how much he was not able to say. A receiver was appointed March 29, 1932.

The evidence further shows that a bookkeeper of the hospital as a matter of fact handled the money; that the checks of the hospital

agreed to furnish the surety bond for \$500 covering the treasurer of the hospital, cost of the bond to be defrayed by plaintiff. The bond was apparently executed pursuant to the provisions of this contract.

The evidence shows that plaintiff did business with the hospital from June 30, 1931, until it went into the hands of a Federal receiver about March 17, 1932. During that time plaintiff performed services according to the contract for the North Chicago Hospital. Certain payments were made according to the terms of the contract, from time to time, and there is now due to plaintiff a balance of \$251.46, which is still unpaid.

The evidence further shows that Mr. Tweed, president of the plaintiff institute, had a conversation with Dr. Gordon November 13, 1931, in which Dr. Gordon said that he did not then have the money to pay what was due, but that if that date he would permit plaintiff to keep \$100 instead of \$50, which it was entitled to under the contract, and credit the other \$50 on the bank account, and this was done from that date up to the time the hospital was taken over by the Federal receiver.

There is no dispute that the balance of \$251.46 is due to plaintiff and has not been paid. Mr. Tweed testified that there was no definite time set for the hospital and plaintiff institute to receive accounts in each month; that sometimes the collection was made monthly but later on it was made every day; that up to the time the bond was in effect monthly statements were rendered; that the petition for bankruptcy against the hospital was filed September 10, 1931, and the hospital was liquidated in its payments at that time - 25 how much he was not able to say. A receiver was appointed March 29, 1932.

The evidence further shows that a bookkeeper of the hospital as a matter of fact received the money; that the checks of the hospital

went through her hands; that Dr. Deacon signed those checks and no one else; further, that Dr. Deacon as president and treasurer of the hospital had absolute control of the money. The president of plaintiff institute testified:

"There was no definite time set for the North Chicago Hospital and the General Radium Institute to render accounts to each other. Sometimes it was collected monthly, later on it was collected every day. Up until the time the bond was in effect monthly statements were rendered."

There is no proof in the record as to whether any dividend has or has not been paid by the bankrupt, and the amount of loss which will finally fall upon plaintiff is not established by the evidence.

The question for determination here is whether the condition of the bond has been violated. It is not disputed that the bankrupt is indebted to plaintiff for the amount for which judgment was rendered, but the surety contends that there is no proof in the record of any act or acts of fraud, dishonesty, forgery, theft, embezzlement, "wrongful abstraction or wilful misapplication" by Frank Deacon, who is described in the bond as the employee.

Plaintiff cites Murray v. Kaskaskia Live Stock Ins. Co., 204 Ill. App. 568, and City Trust Safe Deposit & Surety Co. v. Lee, 204 Ill. 69, which held that a bond prepared by the obligor would be most strongly construed against him in case of ambiguity. We do not question that rule, but cannot find anything ambiguous about this contract. On the other hand, similar provisions of insurance contracts have been construed in actions brought to recover thereon under similar circumstances in a number of cases cited by defendant. In all of these it has been held that it is not sufficient to prove that an unpaid indebtedness exists, but fraud, dishonesty or intentional wrongdoing of some sort on the part of the employee must be established. Orion Knitting Mills v. U. S. Fidelity & Guaranty Co., 137 E. C. 566; 70 L.R.A. 167;

went through her hands; that Dr. Pearson signed those checks and no one else; further, that Dr. Pearson as president and treasurer of the hospital had absolute control of the money. The president

of plaintiff insurance testified:

"There was no definite time set for the North Chicago hospital and the General Hospital Institute to render assistance to each other. Sometimes it was collected monthly, but on it was collected every day. Up until the time the bond was in effect monthly statements were rendered."

There is no proof in the record as to whether any dividend has or has not been paid by the bank, and the amount of loss which will finally fall upon plaintiff is not established by the evidence.

The question for determination here is whether the condition of the bond has been violated. It is not disputed that the bank trust is indebted to plaintiff for the amount for which judgment was rendered, but the surety contends that there is no proof in the record of any act or acts of fraud, dishonesty, forgery, theft, or perjury, "fraudulent representation or willful misapplication" by Frank Pearson, who is described in the bond as the employee.

Plaintiff cites Wright v. American Life Stock Ins. Co.,

204 Ill. App. 586, and City Trust & Savings Bank v.

112, 204 Ill. 38, which hold that a bond prepared by the obligor would be most strongly construed against him in case of ambiguity. It is not questioned that there, but cannot find anything ambiguous

about this contract. On the other hand, similar provisions of insurance contracts have been construed in actions brought to recover thereon under similar circumstances in a number of cases cited by defendant. In all of these it has been held that it is not sufficient to prove that an unpaid indebtedness exists, but fraud, dishonesty or intentional wrongdoing of some sort on the part of the employee must be established. Wright v. American Life Stock Ins. Co., 204 Ill. 38, 127 N.E. 2d 127.

Monongahela Coal Co. v. Fidelity & Deposit Co., 94 Fed. 732; Birrell, Inc. v. Fidelity & Casualty Co., 193 Ia. 860; 188 N. W. 26, and Louis Fisitz Dry Goods Co. v. Fidelity & Deposit Co., 223 Ala. 385; 136 So. 800.

In the last mentioned case the phrase "wilful misapplication" is construed, and the court, after examining the authorities, holds that the same was so closely associated with the words preceding as to take color therefrom, and that proof of some kind of intentional wrongdoing is necessary to establish the liability of the insurance company. This was the conclusion of the court, although the rule that the contract should be construed liberally in favor of the insured and strictly against the company was applied.

Following these authorities it must be held that the proof here was insufficient to establish liability; that the finding for plaintiff was contrary to the law and the facts, and that it was error to enter judgment in favor of plaintiff. It may be that the bond does not express the real intention of the parties, but if so, it cannot be corrected in this suit.

For these reasons the judgment will be reversed with a finding of facts and judgment here in favor of defendant.

REVERSED WITH FINDING OF FACTS AND
JUDGMENT HERE.

O'Connor and McSurely, JJ., concur.

FINDING OF FACTS.

We find as facts that the evidence in this case fails to establish any wrongful abstraction or wilful misapplication of any moneys or property by the employee, Frank Deacon, or any intentional wrongdoing by him, or any act or conduct such as to give the assured, plaintiff in this case, a right of action against defendant insurance company.

to find as facts that the evidence in this case fails to establish any wrongful association or willful misassociation of any person or property by the employee, Frank Jackson, or any intentional wrong done by him, or any act or conduct such as to give the assured, plaintiff in this case, a right of action against defendant insurance company.

36618

PEOPLE, OF THE STATE OF ILLINOIS
ex rel. OSCAR NELSON as Auditor
of Public Accounts of the State
of Illinois,

Complainants,

vs.

CITIZENS TRUST AND SAVINGS BANK,
a Corporation, et al.,
Defendants.

Appeal of OLIVER F. SMITH,
Claimant - Appellant,
vs.

ERWIN J. ZUEHLIS, Receiver of Citizens
Trust and Savings Bank,
Respondent - Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

271 I.A. 604¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by claimant Smith which has been consolidated for hearing with General No. 36619, (where Ossian Cameron is the claimant and appellant) from an order of the court which overruled the exceptions of claimant, disallowed his claim and entered judgment for costs against him.

The amended statement of claimant was filed May 23, 1931, and averred that the bank of which respondent is receiver, on December 27, 1926, fraudulently converted to its own use 472 shares of capital stock of said bank, then the property of claimant. The statement averred that the conversion was fraudulently concealed by the bank and its then president, Staver, and other officers until January 17, 1929; that the value of the stock when converted was \$150 a share, and that claimant was entitled to have his demand allowed as a preferred claim for the value of his shares with interest thereon to the total amount of \$33,563.40. The claim of Ossian Cameron is by assignment from Smith and involves 110 of the same shares. His amended claim was submitted at the same time as

PROBATE OF THE WILL OF HILTON
ex rel. CECIL WILSON as Auditor
of Public Accounts of the State
of Illinois.
Complaints.

vs.

CITIZENS TRUST AND SAVINGS BANK,
a Corporation, et al.,
Defendants.

vs.

HELEN J. EUBANK, Receiver of Citizens
Trust and Savings Bank,
Plaintiff - Respondent.

Appeal of HELEN J. EUBANK,
Plaintiff - Respondent.

OFFICE OF THE CLERK

COUNTY OF COOK, ILLINOIS.

1911 A.D.

BEFORE ME, JUDGE OF THE COURT,
appeared the parties to the above
entitled cause.

This is an appeal by Plaintiff Helen J. Eubank
dated for hearing with General No. 36618, (where Helen Eubank is
the claimant and respondent) from an order of the court which over-
ruled the exceptions of defendant, dismissed his claim and entered
judgment for costs against him.

The amended statement of defendant was filed May 23, 1911,
and avers that the bank of which respondent is receiver, on Decem-
ber 27, 1905, fraudulently converted to its own use 475 shares of
capital stock of said bank, then the property of plaintiff. The
statement avers that the conversion was fraudulently committed
by the bank and its then president, officers, and other officers
until January 17, 1906; that the value of the stock when converted
was \$150 a share, and that plaintiff was entitled to have his demand
allowed as a preferred claim for the value of his shares with in-
terest thereon in the total amount of \$83,625.00. The claim of
Helen Eubank is by restatement from Helen and involves \$10 of the
same shares. The amended claim was admitted at the same time as

that of Smith, and he asked that the same be allowed as a preferred claim in the amount of \$19,474.52.

The records in these two proceedings are similar and present identical questions for our consideration. The claims stand or fall together. The controlling question in each case is whether the final order entered was proper under the evidence.

It seems appropriate to call to mind some of the uncontradicted facts. Claimant, Oliver Smith, seems to have organized the bank and became its president in 1905. Its capital stock when organized was \$50,000 and its shares were of the par value of \$100 each. Smith remained president continuously until December 27, 1921, when the bank examiners called the directors together and disclosed to them that there had been an over issue of stock of the bank (which at that time had been increased from \$50,000 to \$200,000) to the amount of 283 shares. Smith thereupon resigned as president, and in January, 1922, H. B. Staver, who had theretofore been one of the directors, was elected to succeed him and continued to act as president of the bank until it was closed after a run on August 4, 1930. Although no longer president, Smith continued to act as director until the bank closed.

The amended claim of Smith alleged the conversion of the following certificates: No. 76 for 25 shares, No. 161 for 12 shares, No. 163 for 10 shares, No. 177 for 25 shares, No. 194 for 19 shares, No. 243 for 100 shares, No. 244 for 100 shares, No. 245 for 40 shares, No. 247 for 100 shares, and another certificate, the number of which was not alleged, for 41 shares, making a total of 472 shares. Cameron's amended claim alleged the conversion of stock represented by Certificate No. 240 for 10 shares and Certificate No. 242 for 100 shares, making a total of 110 shares. With the exception of the certificate for 41 shares, all of these certificates were introduced in evidence and appear in the record.

It appears from these certificates and from the evidence that all of them were issued to Smith and that they were endorsed by him and either cancelled or reissued to other persons while he was president of the bank.

The claim that the stock was converted seems to be based almost entirely upon the testimony of Smith, who in substance states that these shares of stock had been put up by him as collateral to a number of his notes which were held by different banks; that some of the directors of the bank were endorsers on these notes, and that an arrangement was made by which Staver was to take up the notes when they were paid and show them to the directors, so they would know that the obligation had been met. Smith says that he ordered the different notes and collateral turned over to Staver for that purpose. He says that he asked Staver for a statement after the notes were paid and that Staver said he would give the statement to him but that he never did so. He also says that 301 of these shares were to be turned over to his friend and partner - one Hughes, to whom he was at that time indebted, and that he first learned in a proceeding before Master in Chancery Pollack on January 17, 1929, that these 301 shares had not been turned over to Hughes and that the other certificates had been cancelled.

The proceeding before the Master involved a creditor's bill brought against Smith by one Fireman, a case which finally reached this court and was considered by the second division. Fireman v. Smith, 261 Ill. App. 641. Hughes was dead at the time of this trial, but he testified in that case that he never received the 301 shares of bank stock which were to have been given to him.

Smith admits that prior to his resignation from the presidency in 1921, there was some confusion with regard to the outstanding shares of the bank, for some of which interim certificates had been issued. All of the stock sold by the bank was sold through

It appears from these certificates and from the evidence that all of them were issued to Smith and that they were endorsed by him and either cancelled or retained to other persons while he was president of the bank.

The claim that the stock was converted seems to be based almost entirely upon the testimony of Smith, who in substance states that there was a stock put up by him as collateral to a number of his notes which were held by different banks; that some of the directors of the bank were endorsing on these notes, and that an arrangement was made by which Staver was to take up the notes when they were paid and show them to the directors, so they would know that the obligation had been met. Smith says that he ordered the different notes and certificates turned over to Staver for that purpose. He says that he asked Staver for a statement after the notes were paid and that Staver said he would give the statement to him but that he never did so. He also says that 201 of these shares were to be turned over to his friend and partner - one Hughes, to whom he was at that time indebted, and that he first learned in a proceeding before Staver in January 1901, that these 201 shares had not been turned over to Hughes and that the other certificates had been cancelled. The proceeding before the latter involved a creditor's bill brought against Smith by one Williams, a case which finally reached this court and was considered by the second division. 1902 201 Smith, 201 Ill. App. 601. Hughes was dead at the time of this trial, but he testified in that case that he never received the 201 shares of bank stock which were to have been given to him. Smith testified that prior to his resignation from the presidency in 1901, there was some confusion with regard to the outstanding shares of the bank, for some of which interim certificates had been issued. All of the stock sold by the bank was sold through

Smith. Smith at that time was friendly with Staver, and apparently they continued to be on friendly terms up to the time that Staver gave his testimony before the master in the case of Fireman v. Smith. Throughout the years he never wrote a letter about this stock and seems to have made no demand in regard to it until after that time. Smith admitted upon the hearing that he had received as a matter of fact 103½ shares of the bank stock represented by certificates Nos. 290, 291, 303 and 305. He also admitted that he authorized to be issued to one King 45 shares and 4 shares to one Deary. It would therefore appear that claimant Smith was quite mistaken as to a substantial part of his claim when he filed his statement. Smith's evidence and a transcript of the testimony given by Staver at the hearing before the master in Fireman v. Smith was practically the only evidence submitted in behalf of claimants.

Cameron, however, testified to a written demand made on Staver for an examination of the books of the bank on January 17, 1927.

Staver's testimony is to the effect that when he became president the stock issued by the bank was in a much mixed condition; that Smith had sold practically all of the increased stock; that some persons had paid for their stock and had not received certificates; that Smith had issued some receipts for stock, - some signed by him personally, some signed by him in the name of the bank and the bank examiner asked him, Staver, to straighten the matter out. Staver says that he had numerous conversations with Smith in December, 1921, and January, 1922, about issuing the stock at the bank - sometimes in the presence of Woodrow, who was the cashier and vice-president, but mostly in the presence of Campbell, who was the bank examiner; that Smith told him to issue certificates in every case where there was an interim receipt or where he (Smith)

Smith, Smith at that time was friendly with Beaver, and apparently they continued to be on friendly terms up to the time that Beaver gave his testimony before the master in the case of Wickham v. Smith. Throughout the years he never wrote a letter about this stock and seems to have made no attempt in regard to it until after that time. Smith admitted upon the hearing that he had received an a letter of that date signed by the bank stock represented by certificates Nos. 290, 291, 292 and 293. He also admitted that he authorized to be issued to one and as shares and a share to one heavy. It would therefore appear that claimant Smith was quite mistaken as to a substantial part of his claim when he filed his statement. Smith's evidence and a transcript of his testimony given by Beaver at the hearing before the master in Wickham v. Smith was previously the only evidence submitted in behalf of claimant.

Claimant, however, admitted to a written demand made on Beaver for an explanation of the issue of the bank on January 15, 1927.

Beaver's testimony is to the effect that when he became president the stock issued by the bank was in a much mixed condition; that Smith had previously all of the increased stock; that some persons had paid for their stock and had not received certificates; that Smith had issued some negotiable stock, - some signed by him personally, some signed by him in the name of the bank and the bank examiner asked him, however, to establish the matter. Beaver says that he had no conversation with Smith again in December, 1921, and January, 1922, except during the stock at the time - sometime in the presence of Woodman, who was the assistant and vice-president, but mostly in the presence of Campbell. It was the usual examination; that Smith told him to issue certificates in every case where there was an interest receipt or note for (Smith)

had sold the stock; that Smith turned over to the bank examiner whatever stock he had which was not up as collateral, and that when Hughes' note was taken care of a part of the stock which was collateral to that was turned over to the bank examiners and the rest to him (Staver) to distribute. He says that he and Smith continued to be friendly until 1928 or 1929, when he stopped lending money to Smith. He also concedes error in the evidence given in Fireman v. Smith.

Staver's testimony is corroborated by Ludlow, a certified public accountant, who made an examination of the stock certificate books of the bank; by Woodrow, cashier and vice-president, who was connected with the bank from 1922 until it closed. He is also corroborated by all the written evidence which appears in the case, and it cannot we think be seriously contended that the evidence of Smith, practically uncorroborated and contradicted as it is, can be given weight sufficient to overcome the finding of the court..

Without going into the matter in great detail, we think there are several reasons which preclude giving any such weight to Smith's testimony. His evidence is inherently improbable, his lack of diligence almost amounts to laches, (he delayed almost ten years before asserting any claim); the denials of Staver are corroborated by all the circumstances, by all the documents and by the testimony of Woodrow and the bank examiner - these make it quite impossible to reach any conclusion other than that expressed by the finding of the decree.

Respondent contends (erroneously, we think) that since the master saw and heard the witnesses and his finding was approved by the chancellor, the decree will not be reversed as contrary to the evidence unless an examination should disclose that the findings of the chancellor are clearly and palpably wrong. There are cases

had held the stock; that Smith turned over to the bank examiner whatever stock he had which was not up as collateral, and that when Hughes' note was taken care of a part of the stock which was collateral to that was turned over to the bank examiner and the test to him (Staver) is established. He says that he and Smith continued to be friendly until 1935 or 1936, when he stopped lending money to Smith. He also concedes error in the evidence given

In Staver v. Smith.

Staver's testimony is corroborated by Howell, a certified public accountant, who made an examination of the stock certificates books of the bank; by Woodrow, cashier and vice-president, who was connected with the bank from 1922 until its closure. He is also corroborated by all the written evidence which appears in the case, and it cannot be said that he is seriously contradicted in the chance of Smith, practically uncorroborated and contradicted as it is, can be given weight sufficient to overcome the finding of the court.

Without going into the matter in great detail, we think there are several reasons which would give any such weight to Smith's testimony. His evidence is inherently improbable, his lack of diligence almost amounts to a lack of it; the denial of Staver is corroborated by all the circumstances, by all the documents and by the testimony of Woodrow and the bank examiner - there make it quite impossible to reach any conclusion other than that expressed by the finding of the court.

Respectfully submitted (Staver), we think that since the master has not heard the evidence and his finding was approved by the chancellor, the same will not be reversed as contrary to the evidence which we would like to disclose that the findings of the chancellor are clearly and palpably wrong. There are cases

which so hold, but the later authorities are contrary. The rule is that the findings of a master under such circumstances are advisory and only prima facie correct. They are to be given due weight, of course, but they do not have the same force as the verdict of a jury or as the findings of a decree where the chancellor has seen and heard the witnesses. Koffitz v. Koffitz, 290 Ill. 45; Larson v. Glos, 235 Ill. 584; Oliver v. Ross, 289 Ill. 637. However, the complaining party upon review should point out evidence sufficient to overcome the finding of the master which is considered prima facie correct. Such evidence has not been pointed out in this case.

Claimant endeavors to meet this situation upon a theory, which apparently did not present itself to him at the time his claim was filed. That theory is that in a case of this kind a bank is in the first instance held to the liability of a trustee ex maleficio, and that the burden is on the bank to show that it was not guilty of negligence or misconduct. Allmon v. Salem B. & L. Assoc., 275 Ill. 336, is cited. That case is quite easily distinguishable upon the facts, since the transfer of stock was there made and the proceeds of it paid out without the production of the certificate. Here, the certificates were produced and duly endorsed by the claimant, Smith, to whom and by whom they were issued. This being the situation as shown by the record, it was necessary to establish a case for claimant and to show facts from which a fraudulent conversion might be inferred by a preponderance of the evidence. Claimants did not meet that burden of proof, and the order of the chancellor is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

which so held, but the latter authorities are contrary. The rule is that the findings of a master under such circumstances are advisory and only prima facie correct. They are to be given due weight, of course, but they do not have the same force as the verdict of a jury or as the findings of a dectee where the chancellor has seen and heard the witnesses. Wright v. Wright, 220 Ill. 48; Wright v. Wright, 225 Ill. 521; Wright v. Wright, 225 Ill. 521. However, the complaining party upon review should point out evidence sufficient to overcome the finding of the master which is considered prima facie correct. Such evidence has not been pointed out in this case. Claimant endeavors to meet this situation upon a theory, which apparently did not present itself to him at the time his claim was filed. That theory is that in a case of this kind a bank is in the first instance held to the liability of a trustee or agent, and that the burden is on the bank to show that it was not guilty of negligence or misconduct. Wright v. Wright, 225 Ill. 521. That case is quite easily distinguishable upon the facts, since the transfer of stock was there made and the proceeds of it paid out without the protection of the certificate. Here, the certificates were produced and duly endorsed by the claimant, both to whom and by whom they were issued. This being the situation as shown by the record, it was necessary to establish a case for claimant and to show facts from which a fraudulent conversion might be inferred by a preponderance of the evidence. Claimant did not meet that burden of proof, and the order of the chancellor is therefore affirmed.

WRIGHT.

36619

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. OSCAR NELSON as Auditor of
Public Accounts of the State of Illinois,
Complainants,

vs.

CITIZENS TRUST & SAVINGS BANK,
a Corporation, et al.,
Defendants.

OSSIAN CAMERON,
(Claimant) Appellant,

vs.

ERWIN J. ZUEHLIS, Receiver
of Citizens Trust & Savings Bank,
(Respondent) Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

271 I.A. 604²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The facts and the law on this appeal are similar to those
which appear in case General No. 36618, claim of Oliver F. Smith,
in which we have this day filed an opinion. For the reasons set
forth in that opinion, the decree here will also be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

THE PEOPLE OF THE STATE OF ILLINOIS
vs. JOHN GEORGE KELLY and another et
al. Public Accounts of the State of Illinois,
Complainants.

vs.

CITIZENS TRUST & SAVINGS BANK,
a corporation, et al.,
Defendants.

JOSEPH GABLER,
(Claimant) Appellant,

vs.

KENNETH J. KUNDEL, Receiver
of Citizens Trust & Savings Bank,
(Respondent) Appellee.

ALFRED THOM SUPERIOR
COURT OF COOK COUNTY.

281 I.A. 604

MR. PHILLIPS JUSTICE RATIONALLY
REVIEWED THE OPINION OF THE COURT.

The facts and the law on this appeal are stipulated in those
which appear in cases General No. 2812, claim of Oliver E. Smith,
in which we have this day filed an opinion. For the reasons set
forth in that opinion, the decree here will also be affirmed.

THIRTIETH.

O'Connor and Kohnen, J.L., counsel.

36683

JOHN A. SAND,
Appellee,

vs.

HENRY ANDERSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

271 I.A. 604³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Sand, plaintiff, sued to recover for damages sustained by reason of a collision between the Auburn automobile he was driving and the Pierce Arrow automobile driven by defendant, Anderson. There was a trial by the court and a finding for plaintiff in the sum of \$385.76, and a motion for a new trial and in arrest of judgment having been overruled there was judgment on the finding for that amount, which defendant seeks to reverse by this appeal.

It is urged for reversal that the finding and the judgment are contrary to the law and the evidence, in that there is no proof of negligence on the part of defendant and the evidence shows plaintiff was guilty of contributory negligence.

The collision occurred at the intersection of St. Lawrence avenue and 51st street in Chicago. St. Lawrence avenue is a public highway extending north and south and 51st street is an east and west public highway. There was a street car track on 51st street, and that street by an ordinance of the City of Chicago had been declared to be a "through" street, the ordinance providing that every operator of a vehicle or street car traversing any street intersecting a "through" street should stop such vehicle or street car before entering upon the "through" street, but that such stop was not required when a "Go" signal was given by an official traffic signal or police officer. The ordinance directed that the Commissioner of Public Works was authorized to erect suitable signs visible by day and night to designate the provi-

CHICAGO MUNICIPAL COURT

CHICAGO

SY 11 A. 004

TO: A. L. LADD,
Appellant,
vs.
HENRY HENNINGSON,
Appellee.

IN RE: HENNINGSON, JUSTICE RATCHMENT
REVEREND THE CHURCH OF THE COURT.

And, Plaintiff, to recover for damages sustained

by reason of a collision between the motor automobile he was

driving and the motor automobile driven by defendant,

underpin. There was a trial by the court and a finding for

plaintiff in the sum of \$500.00, and a motion for a new trial and

in arrest of judgment having been overruled there was judgment

on the finding for said amount, which defendant seeks to reverse

by this appeal.

It is urged for reversal that the finding and the judgment

are contrary to the law and the evidence, in that there is no

proof of negligence on the part of defendant and the evidence

shows plaintiff was guilty of contributory negligence.

The collision occurred at the intersection of St. Lawrence

avenue and 31st street in Chicago. St. Lawrence avenue is a pub-

lic highway extending north and south and 31st street is an east

and west public highway. There was a street car track on 31st

street, and that street by an ordinance of the City of Chicago had

been declared to be a "through" street, the ordinance providing

that every operator of a vehicle on street car traveling any

street intersecting a "through" street shall stop such vehicle

or street car before entering upon the "through" street, but that

such stop was not required when a "stop" signal was given by an

official traffic signal or police officer. The ordinance directed

that the Commissioner of Public Works was authorized to erect

traffic signs visible by day and night to designate the provi-

visions of this section; that the Commissioner might erect signs requiring operators to bring vehicles to a complete stop at intersections or other places where such regulation was required by public safety.

The collision in this case occurred about one o'clock in the morning of April 1, 1932. As already stated, defendant was driving a Pierce Arrow car west on 51st street; plaintiff was driving an Auburn car north on St. Lawrence avenue, just coming out of the park; 51st street forms the north boundary of the park.

Plaintiff says that as he drove out of the park and reached 51st street he slowed down; that a "Slow" sign was there, and that he slowed down before he reached the street car tracks; that as he got over to the north rail of the street car track defendant's car hit the right-hand side of his car, at the rear hub and knocked his car across the street and over the curb and turned it around; that defendant continued west on 51st street. Plaintiff says that as he approached 51st street he looked to his right and to his left and that he saw defendant about three-quarters of the block to the east, coming west, on 51st street. His testimony is to the effect that he was driving his car approximately from eighteen to twenty miles an hour, while, in his opinion, defendant's car was coming at a speed of fifty miles per hour. Plaintiff says that when defendant came closer to him defendant increased his speed and in his opinion was traveling between fifty and sixty miles an hour; that when he first saw defendant, defendant was about 450 feet away; that the light on defendant's car was burning, and that his (plaintiff's) brakes were in good condition and could stop his car in from ten to fifteen feet when going eighteen to twenty miles an hour. He says he applied the brakes to slow down at the intersection but not after he saw defendant's car coming fifty to sixty miles an hour; that his view was not obstructed as he came around the corner, and that it is

visions of this section; that the Commission might not alone
regulate operators to bring vehicles to a complete stop at inter-
sections or other places where such regulation was required by

public safety.

The collision in this case occurred about one o'clock in

the morning of April 1, 1932. As already stated, defendant was

driving a Pierce Arrow car west on 13th Street; plaintiff was

driving an Auburn car north on 13th Street, having come

out of the park; 13th Street forms the north boundary of the park.

Plaintiff says that as he drove out of the park and reached

13th Street he slowed down; that a "slow" sign was there, and that

he slowed down before he reached the street car tracks; that as he

got over to the north rail of the street car track defendant's car

hit the right-hand side of his car, at the rear hub and knocked his

car across the street and over the curb and turned it around; that

defendant continued west on 13th Street. Plaintiff says that as he

approached 13th Street he looked to his right and to his left and

that he saw defendant about three-quarters of the block to the east,

coming west, on 13th Street. His testimony is to the effect that he

was driving his car approximately from fifteen to twenty miles an

hour, while, in his opinion, defendant's car was coming at a speed

of fifty miles per hour. Plaintiff says that when defendant came

closer to him defendant increased his speed and in his opinion was

traveling between fifty and sixty miles an hour; that when he first

saw defendant, defendant was about 40 feet away; that the light on

defendant's car was burning, and that his (plaintiff's) brakes were

in good condition and would stop his car in from ten to fifteen feet

when going fifteen to twenty miles an hour. He says he applied the

brakes to slow down at the intersection but not after he saw de-

fendant's car coming fifty to sixty miles an hour; that his view

was not obstructed as he came around the corner, and that it is

hard for him to tell why he didn't see the defendant's car until he came to the intersection.

Mildred Jernek, who was riding in the back seat of plaintiff's car at the time in question, testified that she remembered that plaintiff slowed up at the intersection, and that there was a "Slow" sign there; that as they started to cross they noticed the other car coming; that when they were about half way in the intersection the other car came at a great speed and smashed into them. She says that when they started to cross the street they could see the other car coming; that it was quite a distance away; that they could see its headlights; that they were just about at the curb line when they saw the other car; that she didn't continue to watch the other car because she thought they had plenty of time to cross the street. She stated that it was her opinion that defendant's car was going at least fifty miles an hour and that plaintiff's car was going at approximately twenty miles an hour.

On the other hand, defendant testified that he approached St. Lawrence avenue at a speed of about thirty miles an hour and was driving between the street car track and the north curb; that when he was about thirty to thirty-five feet from St. Lawrence avenue he saw plaintiff's car; that it was about the same distance south and coming at about the same speed; that as the two cars entered the intersection plaintiff was a little closer than he; that he (defendant) was driving on a "through" street and that he saw "Stop" signs there; that a "Slow" sign was against him and a "Stop" sign against plaintiff. He remembers that the sign on St. Lawrence avenue had red flashing lights. Defendant says he did not slow down; that he expected plaintiff to stop and that he continued through the intersection at thirty miles an hour and the front of his car collided with the rear end of plaintiff's car. No one was riding with defendant. He says he applied his brakes when he saw the other car coming.

hard for him to tell why he didn't see the defendant's car until
he came to the intersection.
aligned toward, who was riding in the back seat of a light-
blue car at the time in question, testified that she remembered
that plaintiff drove up at the intersection, and that there was a
"stop" sign there; that as they started to cross they noticed
the other car coming; that when they were about half way in the
intersection the other car came at a great speed and swerved into
them. The boys then they started to cross the street they
could see the other car coming; that it was quite a distance away;
that they could see its headlights; that they were just about at the
cross line when they saw the other car; that when they continued to
watch the other car because she thought they had plenty of time to
cross the street. The witness said it was her opinion that defendant's
car was going at least fifty miles an hour and that plaintiff's
car was going at approximately seventy miles an hour.
On the other hand, defendant testified that he approached
St. Lawrence Avenue at a speed of about thirty miles an hour and
was driving between the street car track and the north curb; that
when he was about thirty to thirty-five feet from St. Lawrence Ave-
nue he saw plaintiff's car; that it was about the same distance
south and looking at it, he saw a red; that as the two cars ap-
proached the intersection plaintiff was a little ahead of him; that
he (defendant) was driving on a "red" light and that he saw
"stop" signs there; that a "stop" sign was against him and a "stop"
sign against of plaintiff. He remembered that the sign on St. Law-
rence Avenue had red lights. Defendant says he did not slow
down; that he expected plaintiff to stop and that he continued forward
the intersection at thirty miles an hour and the front of his car
collided with the rear end of plaintiff's car. He was riding
with defendant. He says he applied his brakes when he saw the
other car coming.

Martin Boarzan, a chauffeur who lived in the neighborhood, testified that at the time of the collision he was on the north-west corner of 51st street and St. Lawrence avenue, walking east; that the Pierce Arrow car was coming west at twenty-five to thirty-five miles an hour; that the other car was turning into St. Lawrence avenue from the park; that both cars were about seventy-five feet from the intersection and were coming at about the same rate of speed. The witness said he stopped to see if there was going to be an accident and when he saw they were only about ten feet apart he started to run because he figured that if they sideswiped they would hit him where he was standing.

William McGee, who lived in the neighborhood of the collision and who was a taxicab driver, testified that at the time of the accident he was cruising south on St. Lawrence avenue; that he saw the Auburn car turn out of the park; that both cars were going about forty to forty-five miles an hour and that neither one slowed down at the intersection; that the Pierce Arrow hit the Auburn and knocked it over onto St. Lawrence avenue. He judged the speed of the Pierce Arrow by the force of the impact to be thirty-five to forty miles an hour.

Defendant, we think, gives the more reasonable account of the manner of the collision. He is corroborated by two disinterested witnesses. The uncontradicted evidence is to the effect that 51st street was a "through" street and that defendant had the right-of-way; and plaintiff in not yielding the right-of-way was guilty of contributory negligence. Singer v. Cross, 257 Ill. App. 41; Popp v. Barker, 264 Ill. App. 484. Indeed, plaintiff in his brief almost seems to concede contributory negligence on the part of plaintiff by arguing that the alleged negligence of defendant was wilful and wanton conduct which would avoid the defense of contributory negligence. There is no evidence in the

Martin located, a defendant who lived in the neighborhood, testified that at the time of the collision he was on the north-west corner of First Street and St. Lawrence Avenue, walking east; that the Pierce Arrow car was coming west at twenty-five to thirty-five miles an hour; that the other car was coming into St. Lawrence Avenue from the park; that both cars were about seventy-five feet from the intersection at the time of the collision; that the driver of the car coming from the park was going to be an accident and when he saw they were only about ten feet apart he started to turn to the right and figured that if they attempted they would hit him where he was standing. William Rogers, who lived in the neighborhood of the collision and was a taxicab driver, testified that at the time of the accident he was driving north on St. Lawrence Avenue; that he saw the Auburn car turn out of the park; that both cars were about seventy-five to eighty miles an hour and that neither one slowed down at the intersection; that the Pierce Arrow hit the Auburn and knocked it over onto St. Lawrence Avenue. He testified the speed of the Pierce Arrow by the force of the impact to be thirty-five to forty miles an hour.

Defendant, we think, gives the more reasonable account of the manner of the collision. It is corroborated by two disinterested witnesses. The corroborated evidence is to the effect that First Street was a "through" street and that defendant was the right-of-way; and defendant is not violating the right-of-way was guilty of contributory negligence. People v. Rogers, 205 Ill. App. 41; People v. Rogers, 204 Ill. App. 44. Indeed, defendant in his brief almost seems to concede contributory negligence on the part of plaintiff by arguing that the alleged negligence of defendant was slight and would not avoid the accident. There is no evidence in the

record to support the theory of such conduct.

We hold that the clear preponderance of the evidence indicates that plaintiff was guilty of negligence which bars his recovery in this action, and for that reason the judgment is reversed with a finding of fact and judgment here for defendant.

REVERSED WITH A FINDING OF FACT
AND JUDGMENT HERE FOR DEFENDANT.

McSurely and O'Connor, JJ., concur.

FINDING OF FACT.

We find as a fact that plaintiff, John A. Sand, was guilty of negligence with reference to the cause of action brought by him, and that he therefore cannot recover.

...to support the theory of such conduct.
 To hold that the clear preponderance of the evidence
 indicates that plaintiff was guilty of negligence which bars his
 recovery in this action, and for that reason the judgment is
 reversed with a finding of fact and judgment here for defendant.

REVEREND AND A FATHER OF THE
 LAW JOURNAL HAVE THE HONORABLE.

Securely and 'Concord, 11, 1900.

REVEREND AND A FATHER OF THE

...as a fact that plaintiff, John A. Bond, was
 guilty of negligence with reference to the cause of action
 brought by him, and that he therefore cannot recover.

36721

POLAR FLUID CO., a Corporation,
Appellee,

vs.

COOMBS FUNERAL HOME, INC., a
Corporation, Doing Business as
COOMBE-McCREADY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 604⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The record here is quite similar to that reviewed in Illinois Casket Co. v. Coombs Funeral Home et al., Gen. No. 36723, in which an opinion has been this day filed. Here, as there, after a motion to dismiss for alleged defects in the service, defendant made a motion for leave to plead to the merits, which amounted to the entry of a general appearance, and waived the motion to dismiss. The affidavit here, as in that case, avers that Coombs, then president of the defendant corporation, conspired with others to wreck the corporation, went to the bailiff's office and had service made on himself, which he thereafter concealed.

After a motion to set aside the service had been denied, it defendant made a motion for leave to defend on the merits, which is elementary amounted to a general appearance. Nicholes v. The People, 165 Ill. 502; Franklin Life Ins. Co. v. Hickson, 197 Ill. 117; The People v. Southern Gem Co., 332 Ill. 370; Brown v. Van Keuren, 340 Ill. 118.

As in the Illinois Casket Co. case, the affidavit of merits here leaves very much to be desired; but it appears therefrom that defendant company was in the undertaking business, operating from two places of business - one of which was situated in Chicago and the other in Maywood; that the Chicago place of business was operated and controlled by McCready, the Maywood place by Cyril C. Coombs; that Coombs conspired with persons named for the purpose of wrecking

COGNAC FINE CO., a corporation,
 Plaintiff,

vs.

COGNAC FINE CO., Inc., a
 corporation, Doing business as
 COGNAC FINE CO.,
 Defendant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

271 I.A. 604

MR. JUSTICE JAMES M. HARRIS
 DELIVERED THE OPINION OF THE COURT.

The record here is quite similar to that reviewed in Illinois
Cognac Fine Co. v. Cognac Fine Co., Inc., 267 Ill. 604, in which
 an opinion has been this day filed. Here, as there, after a motion
 to dismiss for alleged defects in the service, defendant made a
 motion for leave to amend the service, which amendment to the
 entry of a general appearance, and waived the motion to dismiss.
 The affidavit here, as in that case, shows that Cognac, then presi-
 dent of the defendant corporation, conspired with others to wreck
 the corporation, went to the plaintiff's office and had service made
 on himself, which he thereafter concealed.
 After a motion to set aside the service had been denied,
 defendant made a motion for leave to amend the service, which
 amendment resulted in a general appearance. Nicholas v. The People,
 165 Ill. 502; Franklin v. The People, 167 Ill. 117;
The People v. Josephine Co. Inc., 233 Ill. 370; Frank v. Van Hook,
 340 Ill. 118.
 As in the Illinois case, the affidavits of service
 here leaves very much to be desired; but it appears therefrom that
 defendant company was in the underlying business, consisting from
 two places of business - one of which was situated in Chicago and
 the other in Mexico; that the Chicago place of business was operated
 and controlled by defendant, the Mexico place by Cyril C. Cognac;
 that Cognac conspired with persons named for the purpose of wrecking

the business, and that when this suit was filed by the same attorney who represented the Illinois Casket Co., Coombs went to the bailiff's office to be served and concealed from his associates the fact of such service. The circumstances are such (accepting the affidavit as true) that McCready would not be informed with particularity as to any defense which might be interposed.

The statement of claim avers that it is for goods, wares and merchandise sold and delivered as will appear from a statement of account attached to and made a part of it. The statement, however, shows that only part of the items could be said to be for goods, wares and merchandise (these items being for embalming fluid) and all the other items, apparently, were for services rendered in the embalming business. The affidavit of McCready says that there was an understanding between McCready and Coombs that McCready should render service at the place of business in Chicago and Coombs at the place of business in Maywood, and that if either needed help in the course of the business they should personally pay for it. The affidavit of McCready states that he had informed the president of plaintiff, Kuntzman, of this arrangement, and that Kuntzman knew that services performed at the Maywood establishment were to be furnished on the credit of Coombs. The affidavit further avers that defendant corporation had from time to time purchased embalming fluids from plaintiff, and that defendant had paid for these fluids except a small unpaid balance which the affiant was informed Coombs had paid out of moneys he had collected from accounts receivable due to the corporation and which he did not turn over to him.

While, as already stated, the pleading is crude and has elements of uncertainty in it, we think it does in substance tend to show a meritorious defense, and in view of the uncontradicted allegations as to the conduct of Coombs in contriving to be served

the business, and that when his suit was filed by the same attorney who represented the Atlantic Coast Co., Goombs went to the bailiff's office to be served and concealed from his associates the fact of such service. The circumstances are such (accepting the affidavit as true) that Goombs would not be informed with particularity as to any defense which might be interposed.

The statement of Goombs avers that if it is for Goombs, Goombs and merchandise sold and delivered as will appear from a statement of account attached to and made a part of it. The statement, however, shows that only part of the items could be said to be for Goombs, Goombs and merchandise (these items being for examining fluid) and all the other items, apparently, were for services rendered in the examining business. The affidavit of Goombs says that there was an understanding between Goombs and Goombs that Goombs would render service at the place of business in Chicago and Goombs at the place of business in Chicago, and that if either needed help in the course of the business they should personally pay for it. The affidavit of Goombs avers that he had informed the president of plaintiff, defendant, of this arrangement, and that defendant knew that services performed at the Chicago establishment were to be furnished on the credit of Goombs. The affidavit further avers that defendant corporation had from time to time purchased examining fluid from plaintiff, and that defendant had paid for these fluids except a small unpaid balance which the affiant was informed Goombs had paid out of money he had collected from accounts receivable due to the corporation and which he did not turn over to him.

This, as already stated, the affiant is credent and has elements of uncertainty in it, as it is in substance tend to show a reticent defense, and in view of the uncontradicted allegations as to the conduct of Goombs in concealing to be served

and to conceal the service of process upon him, we think the trial court in the exercise of its discretion should have opened up the judgment and permitted defendant to interpose its defense.

For the reasons indicated the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

and to conceal the advice of process upon him, we think the trial
 court in the exercise of its discretion should have opened up the
 judgment and permitted defendant to interpose its defense.
 For the reasons indicated the judgment is reversed and the
 cause remanded for further proceedings consistent with this opinion.
 REVEREND THE HONORABLE WITH DISSENTS.

O'Connor and Kennedy, JJ., concur.

36723

ILLINOIS CASKET CO.,
a corporation,
Appellee,

v.

COOMBS FUNERAL HOME, INC.,
a Corporation, doing business
as COOMBS-McCREADY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

271 I.A. 605¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

November 17, 1932, plaintiff, Illinois Casket Co., brought suit against defendant, filing a statement of claim in which it averred that defendant was indebted to it in the sum of \$5,100.15 for goods, wares and merchandise sold and delivered by plaintiff to defendant at defendant's special instance and request. A statement of account was attached to and made a part of the statement of claim. The statement of claim also averred that November 15, 1932, the account became an account stated between the parties and that by reason thereof plaintiff was entitled to interest at the rate of five per cent per annum from that date to the date of judgment.

The summons issued and was served upon Cyril C. Coombs, president of defendant corporation, November 17, 1932. No appearance was entered, and on December 6, 1932, judgment by default was entered for the sum of \$5,109.25, upon plaintiff's affidavit of claim. A few days thereafter defendant made a motion to vacate the default and judgment which was continued to December 12th, on which date an order was entered giving leave to defendant to file an amended petition instanter. December 19, 1932, defendant

THE UNITED STATES OF AMERICA
a corporation
Plaintiff

v.

GOVERNMENT FURNACE CO., INC.
a corporation, doing business
as GOVERNMENT FURNACE CO.,
Defendant.

FILED IN COURT

NOV 10 1933

281 A. 605

AM. JUDICIAL SYSTEM
OFFICE OF THE CLERK OF THE COURT

November 1, 1933, Plaintiff, Illinois Casket Co.,

brought suit against defendant, filing a statement of claim

in which it asserted that defendant was indebted to it in the

sum of \$2,100.18 for goods, wares and merchandise sold and

delivered by plaintiff to defendant as defendant's special

instance and request. A statement of account was attached to

and made a part of the statement of claim. The statement of

claim also asserted that November 1, 1933, the account became

an account stated between the parties and that by reason thereof

plaintiff was entitled to interest at the rate of five per cent

per annum from that date to the date of judgment.

The account stated was served upon April 6, 1934,

plaintiff of defendant corporation, November 1, 1933. No answer

was entered, and on December 1, 1933, judgment by default

was entered for the sum of \$2,100.18, upon plaintiff's affidavit

of claim. A few days thereafter defendant made a motion to

vacate the default and judgment which was granted on December

12th, on which date an order was entered giving leave to defendant

to file an amended petition in answer. December 19, 1933, defendant

filed a special appearance in writing which stated it was for the purpose of making a motion to quash the service, to vacate the judgment and to dismiss the suit. This motion of defendant, as also a motion to open up the judgment and for leave to defend were denied, and prayed and was allowed an appeal to this court.

The motion of defendant for leave to defend upon the merits constituted a general appearance (Nichols v. People, 165 Ill. 502; Franklin Life Ins. Co. v. Hickson, 197 Ill. 117; People v. Southern Gem Co., 332 Ill. 370; Brown v. Van Keuren, 340 Ill. 118); so the only question to be determined upon this appeal is whether the court erred in denying the motion of defendant that it be allowed to present its defense. The motion was supported by an amended affidavit of Ray G. McCready, who pending the suit became the president of defendant corporation. The rules applicable to such proceedings are well settled and scarcely need discussion. E. R. Co. v. Hunter, 262 Ill. App. 380. The affidavit is construed most strongly against the moving party. Staunton Coal Co. v. Menk, 197 Ill. 369.

It is not sufficient to set forth only facts from which a defense might be inferred. Crossman v. Wohlleben, 90 Ill. 537; Chicago Fire Proofing Co. v. Park Nat'l Bank, 145 Ill. 481. The motion is addressed to the sound discretion of the trial court, and usually a court of review will not interfere unless it appears that this discretion has been abused. Constantine v. Wells, 83 Ill. 192; Culver v. Brinkerhoff, 180 Ill. 548. The courts, however, exist for the purpose of making it possible for litigants to obtain justice, and where an affidavit of this kind shows that the judgment was taken without negligence upon the part of defendant and that he has a good defense to it, it is the usual practice to open up the judgment.

The affidavits in this case show that defendant was a

filed a special appearance in which it was stated it was for the purpose of making a motion to quash the service, to vacate the judgment and to dismiss the suit. This motion of defendant, as also a motion to open up the judgment and for leave to defend were denied, and proper and was allowed an appeal to this court.

The motion of defendant for leave to defend upon the merits constituted a general appearance (Michael v. People, 180 Ill. 608; Franklin Life Ins. Co. v. Chicago, 187 Ill. 117; People v. Southern Bell Tel. & Tel. Co., 188 Ill. 570; Green v. Van Hook, 189 Ill. 112) as the only question to be determined upon this appeal is whether the court acted in denying the motion of defendant that it be allowed to present the defense. The motion was supported by an amended affidavit of J. P. Kennedy, who pending the suit became the president of defendant corporation. The rules applicable to such proceedings are well settled and scarcely need discussion. E. v. Col. v. Hargis, 262 Ill. 471, 300. The affidavit is considered most strongly against the moving party. Jackson Coal Co. v. Smith, 187 Ill. 384.

It is not sufficient to say that only facts from which a defense might be inferred. Green v. Chicago, 187 Ill. 117; People v. Southern Bell Tel. & Tel. Co., 188 Ill. 570. The motion is referred to the sound discretion of the trial court, and usually a court of review will not interfere unless it appears that such discretion has been abused. People v. Smith, 189 Ill. 121; Oliver v. Winkler, 189 Ill. 648. The court, however, erred for the purpose of making it possible for defendant to obtain justice, and there an affidavit of this kind shows that the judgment was taken without negligence upon the part of defendant and that he has a good defense to set in the usual practice to open up the judgment.

The affidavit in this case has been returned as a

corporation engaged in the undertaking business; that affiant, Ray G. McGready, was the secretary of the corporation, and that when the suit was begun November 14, 1932, three days before service was obtained, he as such secretary sent to the stockholders of defendant corporation notice of a special meeting to be held on November 25, 1932, for the purpose of electing directors of the company; that this meeting was held and that at that time, Charles A. Nelson and Cyril C. Coombs, were duly elected directors; that on the following day, namely, November 26th, the affiant caused notice of a directors' meeting to be held December 3, 1932, to be mailed to all the directors of the corporation for the purpose of electing officers; that such meeting was held, that Nelson was elected secretary-treasurer; that Cyril C. Coombs was present at both meetings and was represented by his attorney, Henry A. Gano; that upon receipt of the notice of this meeting, Cyril C. Coombs advised H. S. Greenstein, the attorney for plaintiff, that the stockholders' meeting was about to be held; that Greenstein appeared at the meeting and remained throughout and inquired whether it was the purpose of the meeting to oust Coombs as president; that afterward on November 29th the affiant with an attorney met Greenstein at the office of plaintiff; that Coombs and his attorney Gano, Mrs. Cuning, the president of plaintiff company, and one Hall, also an officer of plaintiff, were present; that at that meeting Greenstein informed affiant that if Coombs was ousted as president, he (Greenstein) would cause defendant company to be thrown into receivership or bankruptcy; that at that time nothing was said to affiant or to his attorney about the pendency of this suit; that affiant believes that the meeting was arranged for the purpose of trying to force defendant to continue to retain Coombs as president

corporation organized in the United States; that Albert
 J. Kohn, was the secretary of the corporation, and that
 when the suit was begun November 14, 1934, three days before service
 was obtained, he as such secretary and as the stockholder of
 defendant corporation notified of a special meeting to be held on
 November 20, 1934, for the purpose of electing directors of the
 company; that this meeting was held on that day at that time, Charles
 A. Kohn and Will C. Kohn, were duly elected directors; that
 on the following day, namely, November 21st, the plaintiff caused
 notice of a directors' meeting to be held December 2, 1934, to be
 mailed to all the directors of the corporation for the purpose of
 electing officers; that such meeting was held, that Kohn was
 elected secretary-treasurer; that Will C. Kohn was present at
 both meetings and was represented by his attorney, Henry A. Green
 that upon receipt of the notice of this meeting, Will C. Kohn
 advised H. A. Greenstein, the attorney for plaintiff, that the
 election of meeting was about to be held; that Greenstein appeared
 at the meeting and remained there about an hour and inquired whether it was
 the purpose of the meeting to amend the articles of incorporation; that Green-
 stein was on November 20th the plaintiff with an attorney and Greenstein
 at the office of plaintiff; that Kohn and his attorney Green,
 Mrs. Green, the president of plaintiff company, and one Hall,
 also an officer of plaintiff, were present; that at that meeting
 Greenstein informed plaintiff that if Kohn was elected as president,
 he (Greenstein) would not be defendant company to be shown into
 relationship or partnership; that at that time nothing was said to
 plaintiff or to his attorney about the company of this suit; that
 plaintiff believes that the meeting was arranged for the purpose of
 trying to force defendant to continue to act in company as president

of defendant; that from November 17, 1932, to and including December 6th affiant frequently saw and talked with Coombs, but that Coombs did not inform affiant or any other of the employees of defendant that suit had been filed by plaintiff or that he had been served with process therein; that the principal place of the undertaking business was at 4506 Sheridan road in the City of Chicago, with a branch at Maywood, Illinois; that certain named associates of Cyril Coombs, including his brother and his attorney, and a former employee of defendant company, have caused another company, known as the Maywood Funeral Home, to be incorporated; that a large part of the stock of this corporation is held by the parties for Cyril C. Coombs, and that these incorporators have entered into a conspiracy to wreck defendant's business and to secure the business enjoyed by defendant at Maywood; that to that end they have established a place of business for the Maywood Funeral Home at 715 South Fifth Avenue in Maywood, which is less than three blocks from the Maywood branch of defendant company. The affidavit avers that plaintiff, by its attorney Greenstein, caused the suit to be filed and the summons to be served on Cyril C. Coombs, well knowing that Coombs would not apprise any other officer or agent of defendant of the fact that he had been served and that he would not cause any defense to be made or appearance to be entered; that plaintiff caused a default judgment to be entered for the purpose of securing an unjust advantage by filing a creditors' bill against defendant and thus securing the appointment of a receiver, in accordance with the threats of Greenstein; that when Coombs was not re-elected president he made similar threats and in furtherance of the scheme accompanied a clerk from the office of Greenstein, to the office of the bailiff of the Municipal court in order to be served with process and this was done to prevent the bailiff from going to

of defendant; that from November 19, 1933, to and including
 December 31, 1933, the said defendant was and failed with defendant, but
 that none of the said defendant or any other of the employees
 of defendant was and had been filled by plaintiff or that he had
 been served with process; that the principal place of the
 undertaking of business was at 1111 Broadway in the City of
 New York, with a branch at New York, New York; that certain named
 associates of plaintiff, including his brother and his attorney,
 and a former employee of defendant, have caused another
 company, known as the New York Mutual Insurance Company, to be incorporated;
 that a large part of the stock of this corporation is held by the
 parties for plaintiff, defendant, and the said insurance company have
 entered into a conspiracy to stock defendant's business and to
 secure the business of the said defendant at New York; that the
 said parties have established a place of business for the New York Mutual
 Insurance Company at 1111 Broadway, New York, which is less than three
 blocks from the New York branch of defendant's company; that the said
 parties, by the said conspiracy, caused the said
 to be filed and the amount to be paid to plaintiff, defendant, and
 the said parties could not receive any other officer or agent of
 defendant of the fact that the said parties could not receive any
 cause any defense to be made or appearance to be entered; that
 plaintiff caused a certain judgment to be entered for the purpose of
 securing an unjust advantage by filing a complaint, bill against
 defendant and thus causing the appointment of a receiver, in violation
 and with the intent of obtaining the assets of defendant and in the interest of the
 effect of plaintiff to cause similar interests and in the interest of the
 estate accompanied a check from the office of the receiver, to the
 office of the plaintiff of the defendant and in order to be served
 with process and this was done to prevent the plaintiff from being so

the principal office of defendant and serving some other officer or employee of defendant. The affidavit charges a purpose to prevent an appearance or a defense to be made and to allow plaintiff to secure judgment by default, all of which was done pursuant to the conspiracy.

Defendant cites authorities to the effect that service of process against a corporation on an officer whose relation to the plaintiff is such as to make it to his interest to suppress the fact of service, is void. Bowers on Civil Process & Service, p. 451, sec. 312; People v. Feicke, 252 Ill. 414; Atwood v. Gault Ste. Marie, etc., 148 Mich. 224, 111 N. W. 747, are cited and sustain the contention.

Defendant also cites authorities to the proposition that where service of summons is procured by plaintiff upon an officer of a corporation whom plaintiff knows will not inform the corporation of such service, it is void. Bowers on Civil Process & Service, p. 4, sec. 4; Great Northern Hotel Co. v. Farrand, 90 Ill. App. 419; Babcock Hardware Co. v. Farmers & Drivers Bank, 54 Kans. 273; Cowan v. Curran, 216 Ill. 598, are cited, all of which hold that process served upon an agent or officer who, it is known, will conceal the fact of service is void.

If this were the only question in the case, we would not hesitate to hold that the service should be set aside, but where as here a motion is made for leave to defend upon the merits, the authorities are to the effect that a defendant must show at least a prima facie defense upon the merits, for obviously if there is no defense to the motion or to any part of it, it would be useless to set aside the judgment.

The affidavit avers "that defendant company has a complete defense on the merits to the whole of the plaintiff's

to receive information by a letter, all of which were done in order to
present an appearance of a letter to be sent and to allow himself
to be employed as a letter. The letter was given a number to
the principal office of the Bureau and to the same office of the

to provide a corporation on an equal basis with the
the plaintiff is such as to make it in his interest to suppress
the fact of service, is void. Motion on Divid. denied & service
E. 481, sec. 315; People v. Smith, 223 Ill. 481; People v. Smith
Pe. 481, sec. 315; People v. Smith, 223 Ill. 481; People v. Smith

Warrant for the collection

The fact that the defendant is a member of the organization is not in dispute. The fact that the defendant is a member of the organization is not in dispute. The fact that the defendant is a member of the organization is not in dispute.

It is true that the only question in the case, as would not hesitate to hold that the merits should be decided, but there is no question in the case for leave to defend upon the merits. The authorities are to the effect that a defendant must show at least a prima facie defense upon the merits. For aught to the contrary there is no defense to the action or to any part of it. It would be unwise to set aside the judgment.

1. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1911:

demand." It avers that defendant has a valuable contract with the U. S. Veterans Bureau, by which it attends and prepares the funerals of deceased veterans dying at the U. S. Veterans Hospital at Hines, Illinois; that from time to time the U. S. government has forwarded checks to defendant company which have been received by Cyril C. Coombs and given to plaintiff; that Coombs has from time to time received notes and moneys from various individuals who are indebted to defendant for services rendered, and that Coombs has given these notes to plaintiff in payment of the alleged indebtedness due plaintiff; that the "petitioner," McGready, is informed and believes that these exceed the sum of \$5100, the amount for which judgment was entered; that Coombs has collected moneys from time to time from various individuals which he has represented to "petitioner" have been paid to plaintiff; that "petitioner" has repeatedly demanded of plaintiff to give him and defendant company an accounting of the moneys so received and credited on the indebtedness which plaintiff has refused to do; that defendant has made payments on account to plaintiff (naming the amounts and dates from July 28, 1932, to November 8, 1932) amounting to the total sum of \$3600, and that "in addition to the foregoing, payments have been made by the defendant to plaintiff in a sum in excess of the balance alleged to be due in the Plaintiff's Statement of Claim." The affidavit also states the intention to file a claim against plaintiff company as soon as interrogatories are answered by plaintiff stating what notes, checks, accounts receivable and other personal property of defendant is in the possession of plaintiff, "wherefore, this petitioner denies that defendant is in any manner indebted to the plaintiff herein in any sum whatsoever."

The affidavit leaves much to be desired in the way of pleading, but it appears from the facts stated that Coombs as

demanded. It was stated that defendant had a valuable contract with the U. S. Veterans Bureau, by which it attended and supervised the funeral of deceased veterans dying in the U. S. Veterans Hospital at Hines, Illinois; that from time to time the U. S. Government has forwarded checks to defendant company which have been received by Cyril G. Gandy and given to plaintiff; that Gandy has from time to time received notes and money from various individuals who are indebted to defendant for services rendered; and that Gandy has given these notes to plaintiff in payment of the alleged indebtedness. The plaintiff stated that the "Reflector", accordingly, is informed and believes that these checks exceed the sum of \$100,000, the amount for which judgment was entered; that Gandy has collected money from time to time from various individuals which he has represented as "positions" have been paid to plaintiff; that "positions" has repeatedly demanded of plaintiff to give him and defendant company an accounting of the money so received and credited on the indebtedness which plaintiff has refused to do; that defendant has made payments on account to plaintiff (making the amount on date June 15, 1934, \$100,000, to October 6, 1935) according to the total sum of \$100,000, and that in addition to the foregoing, payments have been made by the defendant to plaintiff in excess of the balance alleged to be due in the plaintiff's statement of claim. The plaintiff also stated the inclusion in this claim against plaintiff company as such as interest on the money so received by plaintiff, including rent, taxes, interest, attorneys' fees and other payments properly of defendant is in the possession of plaintiff, "whereas" for, this plaintiff claims that defendant is in any manner indebted to the plaintiff herein in any way whatsoever.

The plaintiff has been much to be desired in the way of pleading, but it appears from the facts stated that Gandy has

president of defendant company undoubtedly knew the facts; that he was endeavoring to destroy the property which it was his duty to protect, and that under the circumstances the new president labored under great difficulties in stating the defense. The affidavit of merits must be construed in the light of these circumstances which are undisputed on this record. This court is of the opinion that the trial judge in the exercise of his discretion should have opened up the judgment and given to defendant an opportunity to properly prepare and present its defense.

The judgment will therefore be reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

President of defendant company undoubtedly knew the facts; that
he was endeavoring to destroy the property which is now his only
to protect, and that under the circumstances the new president
imported under false pretenses to destroy the defense. The
activity of the defendant was conducted in the light of these
circumstances which are mentioned in this record. This court
is of the opinion that the trial judge in the exercise of his
discretion should have opened up the inquiry and given to
defendant an opportunity to properly prepare and present his
defense.

The present will therefore be reversed and the
cause remanded for further proceedings consistent with this
opinion.

REVEREND JUDGE

McNulty and O'Connor, JJ., concur.

36686

BELLE SHAPIRO,
Appellee,

vs.

SUPERIOR LOAN & MORTGAGE CO.,
et al.,
Appellants.

637
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

271 I.A. 605²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants, Superior Loan & Mortgage Co., a corporation, Louis Sandler, Bernard Rodin and Abraham Shapiro, alleging the wrongful conversion by them of certain certificates of stock of the face value of \$1500; she admitted an indebtedness of \$750, and upon trial by the court had judgment for the difference, which with interest totaled \$853.11. Defendants appeal, saying that plaintiff deposited the certificates as collateral security for a loan which has not been repaid.

Some time prior to April 28, 1930, plaintiff with certain others held certificates in a common law trust known as the Superior Loan & Mortgage Association; the defendant company was organized as a corporation and took over the business of this trust, hereafter called the association.

Plaintiff says that in 1927 she deposited her certificates with Mr. Sandler, the secretary of the association; that this was purely for safe keeping; that she did not know of and took no part in the organization of the corporation; that neither the association nor the corporation nor any of the defendants had any claim or interest in these certificates; that although she has demanded that they be returned to her, the defendants have refused.

The defendants' evidence tended to show that in 1927 plaintiff borrowed from the association, first \$1000 and then \$400, upon condition that her certificates should be deposited as collateral security, and that they were deposited for this purpose.

Defendants further assert that plaintiff was fully informed of the proposed organization of the defendant corporation and agreed to become a stockholder therein, attended meetings of the stockholders and of the board of directors and received dividend checks from the corporation; that her notes were transferred to the corporation when it took over the business and assets of the association; that her indebtedness to the corporation has been reduced to \$750, and that the corporation holds her certificates as collateral for this indebtedness.

We are of the opinion that plaintiff failed to prove the charge of conversion and that the clear preponderance of the testimony establishes that the certificates of stock were deposited with the association and are held by its successor, the corporation, as collateral security for her indebtedness.

It is undisputed that when plaintiff received the certificates of the association she placed and kept them in her safety deposit box at the Independence State Bank. This tends to discredit her testimony that she deposited them with Mr. Sandler for safe keeping. Why remove them from a place of safety in her own deposit box over which she had exclusive control? Plaintiff's certificates were for various amounts, the first dated September 12, 1924, and running up to May or June, 1927. All of these she kept in her own safety deposit box; it was in April, 1927, that she first deposited them with Mr. Sandler. The only reasonable explanation is that they were deposited with him as collateral security. Plaintiff testified that she had never borrowed money from the association prior to the spring of 1927. Thus, her loan from the association aggregating \$1400, her removal of the certificates from her safety deposit box and their deposit with the association coincide and conclusively show that they were deposited with the association as collateral for a loan.

Plaintiff was clearly mistaken in other points of her evidence. She said she was out of the city from the early part of 1927 until the latter part of the same year, and that when she left the city she owed the association a little money - she did not remember how much - "It may have been \$50." Defendants offered in evidence a note signed by plaintiff dated June 13, 1927, for \$1000, also another note signed by plaintiff dated August 31, 1927, for \$400. All these and other facts support Sandler's testimony that when she applied for a loan she was told that it would be necessary to deposit her certificates as collateral; that she deposited the certificates and obtained the loan.

The trial court refused to admit these two notes in evidence although they were entirely competent as tending to corroborate the testimony of the secretary, Mr. Sandler. The notes are in the record and we have considered them as if they were admitted in evidence.

The corporation was organized April 28, 1930; Sandler testified that at this time he had a conversation with plaintiff on the subject and told her that the association had decided, on advice of its attorney, to incorporate; plaintiff was then told that when it incorporated it would issue new certificates and that plaintiff would have to change her old certificates for new ones; that plaintiff said that she would act with reference to the certificates as everybody did. A new certificate of stock in the defendant corporation was issued to plaintiff April 30th.

Other witnesses testified as to conversations with plaintiff about the proposed change from an association or common law trust to a corporation; that she inquired as to why this was done and was told that it was according to the advice of the attorneys. Plaintiff also attended the first annual meeting of the stockholders of the

plaintiff was heavily mistaken in other points of her evidence. She said she was out of the city from the early part of 1937 until the latter part of the same year, and that she had left the city and owed no association with the money - she did not remember how much - "it may have been \$50." Defendants offered in evidence a note signed by plaintiff dated June 15, 1937, for \$100.00, also another note signed by plaintiff dated August 21, 1937, for \$400. All these and other facts support plaintiff's testimony that when she applied for a loan she was told that it would be necessary to deposit her certificates as collateral; that she deposited the certificates and obtained the loan.

The trial court refused to admit these two notes in evidence without; they were entirely competent as tending to corroborate the testimony of the secretary, Mr. Luntz. The notes are in the record and we have considered them as if they were admitted in evidence.

The corporation was organized April 28, 1933; plaintiff testified that at this time he had a conversation with plaintiff as the subject and told her that the corporation had decided, on advice of its attorney, to incorporate; plaintiff was then told that when it incorporated it would issue new certificates and that plaintiff would have to change her old certificates for new ones; that plaintiff told him that she would not then reference to the certificates as everybody did. A new certificate of stock in the defendant corporation was issued to plaintiff April 30th.

Other witnesses testified as to conversation with plaintiff about the proposed change from an association to common law trust to a corporation; that she indicated as to why this was done and was told that it was according to the advice of the attorney. Plaintiff also attended the first annual meeting of the stockholders of the

corporation on May 18, 1931, and she was also present at other stockholders' meetings; she also received dividend checks from the corporation; also, her attorney in December, 1931, wrote to the defendant company, purporting, as stated in the letter, to represent plaintiff, a stockholder in the company, and demanded the right of a stockholder to examine the books; this right was admitted and plaintiff with her attorney subsequently went to the office of the defendant company and examined the books; she demanded and was accorded the rights of a stockholder. The evidence is convincing that plaintiff knew of and acquiesced in the organization of the defendant corporation and the transfer to it of the business and assets of the common law trust or association.

Although the judgment ran against all the defendants, there is no evidence whatever connecting defendants Rodin or Shapiro with the transaction. Rodin simply testified as to conversations he had with plaintiff, and we do not find that defendant Shapiro's name appears in the controversy. The judgment against these two individuals was unjustified and would necessitate reversal and remanding. Livak v. Chicago and Erie R. R. Co., 299 Ill. 218.

There were many errors upon the trial which would necessitate reversal; however, as we are of opinion that plaintiff has failed to prove the charge made in her statement of claim, and as there can be no recovery in this case, we shall reverse with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Matchett, P. J., and O'Connor, J., concur.

corporation on May 18, 1931, and was also present at other stock-
holders' meetings; she also received dividend checks from the cor-
poration; also, her attorney in December, 1931, wrote to the delin-
quent company, informing, as stated in the letter, to payment of in-
dividual, a stockholder in the company, and demanded the right of a
stockholder to examine the books; this right was refused and plain-
tiff with her attorney subsequently went to the office of the delin-
quent company and examined the books; she demanded and was awarded the
rights of a stockholder. The evidence is convincing that plaintiff
knew of and acquiesced in the organization of the defendant corpo-
ration and the transfer of it of the business and assets of the corpo-
ration to the defendant.

Although the fact that plaintiff and the defendant, there
is no evidence of any connection between them in the transaction
the transaction, which is fully described as an organization and
with plaintiff, and we do not find that defendant intended to
share in the recovery. The defendant admitted that two individuals
was authorized and would negotiate recovery and settlement. Plaintiff

v. Chicago and Erie R.R. Co., 204 Ill. 218.
There were many reasons why the trial court would not
reversal; however, as we are of opinion that plaintiff was liable to
prove the change made in her statement of claim, and as there was no
recovery in this case, we shall reverse with a finding of facts.
REVERSED WITH A FINDING OF FACTS.

Rehearsal, 211, and 212, and 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

36686

FINDING OF FACTS.

We find as facts that defendants did not wrongfully convert the beneficial interest certificates of plaintiff described in her amended statement of claim; that they were deposited with the secretary of the Superior Loan and Mortgage Association as collateral security for a loan which has not yet been paid; that plaintiff had full knowledge of and acquiesced in the organization of the defendant company, Superior Loan and Mortgage Company, and the transfer to it of the business and assets of the Superior Loan and Mortgage Association, and that certificates of stock in the corporation to take the place of her certificates of stock in the association were issued to her.

36931

LOUIS D. GLANZ, as Trustee under
Trust Deed recorded as Document
No. 9602710,

Appellant,

vs.

MEYER W. GOLDSTEIN et al.,
Appellees.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

271 I.A. 605³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an interlocutory order appointing a receiver in a foreclosure proceeding. The defendant does not appear in this court to defend the order.

The bill of complaint was duly filed by Louis D. Glanz as trustee to foreclose a trust deed given to secure 220 bonds aggregating \$60,000; subsequently a petition was filed by Anna Leon, representing that she was the owner and holder of a bond which is a part of the bond issue described in the bill of complaint; that the Glanz Mortgage Company took possession of the premises and had been collecting the rents and expending moneys for the maintenance of the premises; that at the time this company took possession there were vacancies in two of the apartments in the building and that there are now three vacancies; the petition set forth the aggregate receipts and itemized the disbursements; the petition further alleged that the petitioner was informed and believes and so states the fact to be, that the Glanz Mortgage Company -

"are not using due diligence and care in managing the said property, so that it should be fully tenanted and your petitioner further represents that she is informed and believes and so states the fact to be, that many of the expenditures made by the said Glanz Mortgage Company are excessive and that with due care and diligence, the managing and operating expenses of the said building can be greatly reduced, and that it would be for the benefit of your petitioner and all other holders and owners of the bonds on the said mortgage issue that a Receiver be appointed."

LOUIS D. GLANZ, as Trustee under
Trust Deed recorded as Document
No. 600310,

Respondent,

vs.

WYNER W. ROSENTHAL et al.,
Appellants.

MR. JUSTICE ROSENTHAL delivered the opinion of the court.

This is an appeal by the complainant from an interlocutory order appointing a receiver in a foreclosure proceeding. The defendant does not appear in this court to defend the order. The bill of complaint was duly filed by Louis D. Glanz as trustee to foreclose a trust deed given to secure \$20 bonds against \$60,000; subsequently a petition was filed by Anna Leon, representing that she was the owner and holder of a bond which is part of the bond issue described in the bill of complaint; that the Glanz Mortgage Company took possession of the premises and had been collecting the rents and expending money for the maintenance of the premises; that at the time this company took possession there were vacant as in two of the apartments in the building and that there are now three vacancies; the petition set forth the aggregate receipts and itemized the disbursements; the petition further alleged that the petitioner was informed and believes and so states the fact to be, that the Glanz Mortgage Company -

"was not using due diligence and care in managing the said property, so that it would be fully retained and your petitioner further represents that she is informed and believes and so states the fact to be, that many of the expenditures made by the said Glanz Mortgage Company are excessive and that with due care and diligence the managing and operating expenses of the said building can be greatly reduced, and that it would be for the benefit of your petitioner and all other owners and owners of the bonds on the said mortgage loan that a receiver be appointed."

INTERIM DECISION BY APPEAL FROM
COURT OF APPEALS ON COOK COUNTY

2811 A. 000

The court thereupon ordered all parties to answer the petition and complainant filed his answer admitting that the bill of complaint had been filed by him; denies that the Glanz Mortgage Company took possession of the premises, but states that he, the trustee, pursuant to the provisions of the trust deed and pursuant to an agreement between him and the owners of the equity, took possession of the premises for the benefit of the owners and holders of all outstanding bonds; that he as trustee employed the Glanz Mortgage Company, which was in the business of managing real estate, as his agent to manage the premises for this trustee; the trustee further answered that while there were five vacant apartments when he took possession of the premises, at the present time there was only one vacant apartment; that the receipts and expenditures set forth in the petition are substantially correct; the trustee denies that he or his agent are not using due diligence in managing the premises; denies that any of the expenditures are excessive; denies that the operating expenses can be reduced or that the holders or owners of the bonds can be benefitted by the appointment of a receiver; ^{avers} that the premises consist of twelve apartments and that the only expense to which the bondholders are subjected is a sum less than five per cent of the gross annual income.

The court thereupon entered an order upon the petition of Anna Leon, joined in by the owners of the equity, finding that the trustee was not using due care and diligence in the conservation of the property and that it was necessary that a receiver be appointed, and it was thereupon ordered that Harry Smith be appointed receiver upon giving bond.

The complainant in appealing here in this court makes some points which it is unnecessary to notice. We hold that the order appointing a receiver must be reversed for the reason that no sufficient showing was made of lack of diligence or carefulness in making expenditures by the trustee which would justify the appointment of

The court therefore ordered all parties to answer the petition and complaint filed in answer admitting that the bill of exchange had been filed by him; denies that the bill of exchange was taken possession of the premises, but states that he, the trustee, pursuant to the provisions of the trust deed and pursuant to an agreement between him and the owners of the equity, took possession of the premises for the benefit of the owners and holders of all outstanding bonds; that he as trustee employed the Guaranty Company, which was in the business of managing real estate as his agent to manage the business for this trustee; the trustee further answered that while there were live bonds outstanding when he took possession of the premises, at the present time there was only one vacant apartment; that the receipts and expenditures set forth in the petition are substantially correct; the trustee denies that he or his agent are not using due diligence in managing the premises; denies that any of the expenditures are excessive; denies that the operating expenses can be reduced or that the holders of bonds of the bonds can be benefited by the appointment of a receiver; that the premises consist of twelve apartments and that the only expense to which the bondholders are subjected is a sum less than five per cent of the gross annual income.

The court therefore entered an order upon the petition of Anne Lyon, joined in by the owners of the equity, finding that the trustee was not using due care and diligence in the conservation of the property and that it was necessary that a receiver be appointed and it was therefore ordered that Harry Smith be appointed receiver upon living bonds.

The complaint in appealing here in this court makes some points which it is unnecessary to notice. We hold that the order appointing a receiver must be reversed for the reason that no sufficient showing was made of lack of diligence or carelessness in caring for the premises by the trustee which would justify the appointment of

a receiver. The allegations of the petition in this respect are general in nature, alleged on information and belief that the trustee is not using due diligence in managing the property. The mere assertion that a trustee is lacking in this respect is not sufficient; there must be facts presented supporting such assertion. Continental & Commercial T. & S. Bank v. Allie-Chalmers Co., 200 Fed. 600; Gunderson v. Ill. Trust & Savings Bank, 199 Ill. 422; American Trust & Safe Deposit Co. v. Building Corp., 262 Ill. App. 67. In Howling Green Trust Co. v. Virginia Passenger & Payer Co., 132 Fed. 921, it was said: "Courts in any case should be slow to interfere with trustees, in the apparently lawful discharge of their duties at the instance of a comparatively small number of minority bondholders *."

In his verified answer complainant makes an adequate showing as to his management of the premises; he says there was only one vacancy in the twelve apartments, which is an improved condition since he took possession, and that the disbursements were made for the direct benefit of the bondholders. While we might be inclined to question some of the items of disbursement, particularly the item of \$557.03 for "Refrigeration," there is no sufficient showing made that this expense was unnecessary or excessive.

In view of the uncertain and vague allegations of the petition and the showing made by the answer of complainant, we are of the opinion that the receiver should not have been appointed. The order is therefore reversed.

ORDER REVERSED.

Matchett, P. J., and O'Connor, J., concur.

a receiver, the allegations of the petition in this respect are general in nature, alleged in information and belief that the trustee is not using the diligence in managing the property. The mere assertion that a trustee is lacking in this respect is not sufficient; there must be facts presented supporting such assertion. Continental Commercial Bank v. Allen-Whitcomb, 100, 220 Pac. 600; Bankruptcy v. Ill. State Bank, 123, 111, 482; Bankruptcy v. Ill. State Bank, 123, 111, 482; Bankruptcy v. Ill. State Bank, 123, 111, 482. In Bankruptcy v. Ill. State Bank, 123, 111, 482, it was said: "Claims in any case should be also to interfere with trustee, in the apparently lawful discharge of his duties as the trustee of a comparatively small number of directly interested parties."

In his verified answer complainant makes no adequate showing as to his management of the proceeds; no ways there was only one vacancy in the twelve equities, which is an improved condition since its first possession, and since the disbursements were made for the direct benefit of the debtors. While no might be inclined to question some of the items of disbursement, particularly the item of \$157.00 for "attestation," there is no sufficient showing made that this expense was necessary or excessive.

In view of the uncertain and vague allegations of the petition and the answers made by the answer of complainant, we are of the opinion that the receiver should not have been appointed. The order is therefore reversed.

CADRE REVIEWED

March 27, 1911, and 1911, 111, 482.

36856

N. P. SEVERIN and A. N. SEVERIN,
Copartners, Doing Business as
N. P. SEVERIN CO.,

Appellants,

vs.

AMERICAN HEATING AND PLUMBING
CORPORATION, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

271 I.A. 605⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action of assumpsit against the defendant to recover damages for the breach of a contract. There was a trial before the court without a jury, a finding and judgment in defendant's favor, and plaintiff's appeal.

The record discloses that plaintiffs were engaged as general contractors in constructing buildings, had a contract to construct the Evanston Masonic Temple, and solicited bids for subcontractors to do certain parts of the work. Defendant submitted a bid to install the steam heating and ventilating plant in the building. Afterward there were negotiations between plaintiffs and defendant, there being certain modifications of the work to be done on the Masonic Temple, so that defendant submitted four separate and distinct bids as follows: October 2, 1925, defendant proposed to install the steam heating, ventilating, heat regulator and oil burning equipment for \$16,372; on January 14, 1926, defendant submitted another proposition to install a steam heating and ventilating plant for \$14,280. March 20, 1926, defendant submitted a third proposition to install the steam heating and ventilating system in accordance with the plans and specifications "and addendas, No. 1, 2, 3, 4 and 5, for the sum of Twenty Thousand, Two Hundred Seventy-three (\$20,273.00) Dollars;" and on April 30, 1926, it proposed to furnish and install two boilers in addition to the work it proposed to do by its proposal of March 20, 1926, for an additional \$2500, or a

J. E. WELSH and J. E. WELSH,
Sole Proprietors, doing business as
J. E. WELSH CO.,
Appellants.

vs.

AMERICAN STEAMSHIP AND TRADING
COMPANY, INC., a corporation,
Respondent.

APPEAL FROM DECISION OF THE
COURT OF APPEALS

IN CASE NO. 10,000

3455 I.A. 800

THE COURT OF APPEALS, in its decision of the 10th day of June, 1933, in the above entitled case, held that the respondent was entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

The respondent also claims that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination, and that it is entitled to recover the amount of the freight charges and expenses incurred by it in the transportation of the cargo of the vessel, the American Steamship and Trading Company, Inc., from the port of origin to the port of destination.

total of \$22,773. On April 30, 1926, plaintiffs wrote defendant a letter saying that they accepted defendant's proposition of January 14, 1926, and on the next day, May 1st, defendant replied that it had theretofore informed plaintiffs that defendant's proposition of January 14, 1926, had been withdrawn and defendant had made a bid on the revised work on March 20, 1926. Defendant refused to do any of the work and thereafter plaintiffs let the work to other parties at an increase of \$4529 over the \$14,280 which defendant had submitted on January 14, 1926; it is to recover the \$4529 that plaintiffs sue.

Plaintiffs' position is that they accepted defendant's proposition of January 14, 1926, before the latter was withdrawn and it therefore became a binding contract. On the other hand, defendant's position is that plaintiffs rejected defendant's proposition of January 14, 1926, because, plaintiffs stated, the bid was too high; that afterward the work which plaintiffs wanted defendant to do was changed from time to time, and defendant submitted other bids, which showed that the bid of January 14th was not only rejected by plaintiffs but that it was also abandoned. There was a conflict in the evidence as to whether plaintiffs rejected the bid of January 14th because it was too high; but there is no conflict in the evidence that the work to be done was changed from time to time and new bids submitted.

We think the question was one of fact for the court. He saw and heard the witnesses testify and found in favor of the defendant, and we think it clear that we would not be warranted in disturbing the finding on the ground that it was manifestly against the weight of the evidence. We are further of the opinion that the court was warranted in finding that the work proposed to be done by defendant was from time to time materially changed and new bids submitted; this would warrant the finding that the defendant's

total of 102,773. On April 30, 1936, Plaintiff's witness defendant's letter saying that they accepted defendant's proposition of January 14, 1936, and on the next day, May 1st, defendant replied that it had therefore accepted Plaintiff's and defendant's proposition of January 14, 1936, had been withdrawn and defendant had made a bid on the revised work on March 30, 1936. Defendant refused to do any of the work and therefore Plaintiff's for the work to other parties at an increase of \$4000 over the \$12,500 which defendant had submitted on January 14, 1936; it is to recover the \$4000 that Plaintiff's sue.

Plaintiff's position is that they accepted defendant's proposition of January 14, 1936, before the latter was withdrawn and it therefore became a binding contract. On the other hand, defendant's position is that Plaintiff's rejected defendant's proposition of January 14, 1936, because, Plaintiff's stated, the bid was too high; that although the work which Plaintiff's wanted defendant to do was changed from time to time, and defendant submitted other bids, which showed that the bid of January 14th was not only rejected by Plaintiff's but that it was also abandoned. There was a conflict in the evidence as to whether Plaintiff's rejected the bid of January 14th because it was too high; but there is no conflict in the evidence that the work to be done was changed from time to time and new bids submitted.

We think the question was one of fact for the court. We saw and heard the witness testify and found in favor of the defendant, and we think it clear that we would not be warranted in disturbing the finding on the ground that it was manifestly against the weight of the evidence. We are further of the opinion that the court was warranted in finding that the work proposed to be done by defendant was from time to time materially changed and new bids submitted; this would warrant the finding that the defendant's

proposition of January 14th was considered by both parties as having been withdrawn or abandoned.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

proposition of January 1938 was considered by both parties as

having been withdrawn as abandoned.

The interest of the Republic of China remains in

abandoned.

REMARKS.

Reference is made to the fact that the Republic of China

36698

THE CLEVELAND UNIVERSAL JIG
COMPANY, a Corporation,
Appellee,

vs.

DACO MANUFACTURING COMPANY,
a Corporation,
Appellant.

66A
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

271 I.A. 605⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On March 7, 1932, plaintiff brought suit against "Daco Manufacturing Company, a corporation, doing business as Wash Company," to recover \$279 claimed to be due for three items of tools and machinery claimed to have been sold and delivered to defendant. The return of the bailiff shows that he served the summons on the defendant by delivering a copy of the praecipe, statement of claim and affidavit attached to Marie Gritman, agent of said corporation. The "Daco Manufacturing Company, a corporation," entered its special appearance "specially to quash writ for manifest error on its face," and five days later filed an affidavit in support of its motion. The person making the affidavit swears that she is the secretary of the Daco Manufacturing Company; that it is a corporation organized under the laws of Illinois, with its principal place of business at 38 South Dearborn street, Chicago; that it has never done any business under the name of Wash Company nor any other name than Daco Manufacturing Company, "contrary to what appears on the praecipe, statement of claim and summons;" that the Daco Manufacturing Company did not order or receive the goods, wares and merchandise mentioned in plaintiff's statement of claim and that it is in no way indebted to the plaintiff as alleged, "as appears upon the face of the writ," wherefore affiant submits that the action abate and be dismissed.

THE CHRYSLER FINANCIAL CORPORATION,
 a Corporation,
 Plaintiff,
 vs.
 DODGE MANUFACTURING COMPANY,
 a Corporation,
 Defendant.

IN THE CIRCUIT COURT OF CHICAGO.

2711 A. 605

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On March 7, 1932, plaintiff brought suit against "Dodge Manufacturing Company," a corporation, doing business as "Dodge Company," to recover \$279 claimed to be due for three items of tools and machinery claimed to have been sold and delivered to defendant. The return of the bill of sale shows that he received the same on the defendant by delivering a copy of the proceeds, statement of claim and affidavit attached to Maria Britman, agent of said corporation. The "Dodge Manufacturing Company," a corporation, "admitted its special appearance" "specifically to deny writ for writ of error on its face," and five days later filed an affidavit in support of its motion. The person making the affidavit swore that he is the secretary of the Dodge Manufacturing Company; that it is a corporation organized under the laws of Illinois, with its principal place of business at 38 South Dearborn Street, Chicago; that it has never done any business under the name of "Dodge Company" nor any other name than Dodge Manufacturing Company, "contrary to what appears on the proceeds, statement of claim and return;" that the Dodge Manufacturing Company did not order or receive the tools, wires and merchandise mentioned in plaintiff's statement of claim and that it is in no way indebted to the plaintiff as alleged, "as appears upon the face of the writ," wherefore plaintiff submits that the action above and be dismissed.

It is obvious that the showing made in no way shows that the service on the Daco Manufacturing Company by delivering a copy of the praecipe, summons and statement of claim and affidavit attached to the agent of that company, was not good service. Whether the Daco company owed the bill or whether it did business as Wash company were matters that went to the merits of the case. But the court sustained the motion, quashed the service and gave leave to plaintiff to file an amended statement of claim, which plaintiff did by making "J. S. McChesney, doing business as Wash Co. impleaded with Daco Manufacturing Company, a corporation doing business as Wash Co." defendants. The Daco Manufacturing Company filed an affidavit of merits denying that it ordered or received the goods in question and denied that it owed plaintiff any money.

The case was tried before the court without a jury, and on the hearing, on plaintiff's motion, it was ordered that the suit be dismissed as to defendant "J. S. McChesney, doing business as Wash Co." and there was a finding and judgment in plaintiff's favor against the "Daco Manufacturing Co., a Corp." for \$250 and it appeals.

From what we have said it appears that the common law record is confused, and the evidence tending to show the facts is much more confused. The judgment order was entered January 11, 1933. From the statement of the case or bill of exceptions it appears that the last hearing was on March 3, 1933; that there was a hearing on January 11, 1933, and some sort of a hearing on December 28, 1932.

C. B. Cole, called by plaintiff, testified that he did business as the Tool Equipment Sales Company, an Illinois corporation located in Chicago (just how one can do business as a corporation we are unable to understand), and apparently as such he repre-

It is obvious that the showing made in no way shows that

the service on the Pace Manufacturing Company by delivering a copy of the proceeds, summons and statement of claim and affidavit attached to the agent of that company, was not good service. Whether the Pace company owed the bill or whether it did business as such company were matters that went to the merits of the case. But the court sustained the motion, quashed the service and gave leave to plaintiff to file an amended statement of claim, which plaintiff did by making "J. M. McQuinn", doing business as Wash Co. Impleaded with Pace Manufacturing Company, a corporation doing business as Wash Co." defendants. The Pace Manufacturing Company filed an affidavit of service denying that it ordered or received the goods in question and denied that it owed plaintiff any money.

The case was tried before the court without a jury, and on the hearing, on plaintiff's motion, it was ordered that the suit be dismissed as to defendant "J. M. McQuinn", doing business as Wash Co." and there was a finding and judgment in plaintiff's favor against the "Pace Manufacturing Co., a Corp." for \$250 and it appeals.

From what we have said it appears that the common law record is continued, and the witness tending to show the facts is much more continued. The judgment order was entered January 11, 1933. From the statement of the case or bill of exceptions it appears that the first hearing was on March 5, 1933; that there was a hearing on January 11, 1933, and some sort of a hearing on December 23, 1932.

C. M. Cole, called by plaintiff, testified that he did business as the Tool Repair of Union Company, an Illinois corporation located in Chicago (but now can be business as a corporation we are unable to understand), and apparently as such he reported

sented plaintiff, a Cleveland corporation; that he acted for plaintiff in a sales capacity; that he took the order for the goods in question on behalf of plaintiff through McChesney, who was doing business as the "Wash Co." He testified that McChesney was "of the Daco Manufacturing Company;" but it is not clear that the goods were delivered by plaintiff to the Daco Manufacturing Co. at Danville, Illinois.

It further appears from the evidence that numerous demands for payment were made on McChesney or the Wash Co. and none on the Daco Manufacturing Co. A great many letters are in the record, most of which were excluded by the court, which would tend to show that the dealings were between plaintiff through its representative Cole who was doing business as The Tool Equipment Co. No mention is made in these letters that the goods were sold to the Daco Manufacturing Co. We think all these letters should have been admitted, as they would tend to corroborate the Daco company's contention that it did not buy or receive the goods. Standard Brewery v. Healy, 209 Ill. App. 272.

Marie Gritzman testified for defendant that she was employed by McChesney and also by the Daco Manufacturing Company; that she was secretary of that company and also secretary for McChesney, who did business as Wash company; and it further appears from the evidence that McChesney, as Wash Company, and McChesney as representative of the Daco Manufacturing company, and Marie Gritzman all occupied one and the same office. It further appears that the case was continued because it was desired to have McChesney testify, but he did not appear and no explanation of his absence is made.

The record is too uncertain to permit the judgment to stand. For the reason stated the judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

Chicago, Illinois.

[illegible]

It is a very recent and the same is repeated for a new trial. For the reason stated the judgment of the United States of Chicago. The record is too uncertain to admit the judgment to stand. No bill was returned and no explanation of his absence is made. It was continued because it was desired to have McManis testify, but carried out and the same result. It further appears that the case five of the Decca annual meeting company, and this witness of defense that McManis, as a company, and company in connection with him in fact as a company; and it further appears that the witness was secretary of that company and also secretary for McManis, and by McManis and also by the same confidential company; that one Marie Griffin testified that she was employed

U.S. GOVERNMENT PRINTING OFFICE

... ..

856✓
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 606¹

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 14 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1932

Loyd W. Lowe,

appellee,

vs.

Appeal from the Circuit Court

W. R. Hunter, W. W. Huckins,

of Kankakee County

Charles Pratt and Sam L.

Battaglia,

appellants,

Baldwin, J.

This is an appeal from the Circuit Court of Kankakee County, prosecuted by the appellants, who were defendants in the trial court, to reverse a judgment for the sum of \$23,319.88 and costs.

The appellee filed his assumpsit suit in such court and alleged that he had signed a promissory judgment note for the sum of \$21,105.00, payable to the City Trust and Savings Bank of Kankakee, Illinois, as an accomodation co-maker with W. R. Hunter, W. W. Huckins, S. L. Battaglia and Charles Pratt and that the defendants having failed to pay the note, the appellee to avoid suit thereon paid the same and brought this suit to recover the moneys so paid.

The appellee attached his affidavit of claim, setting forth substantially the facts as above described.

The defendants filed pleas of general issue and also filed affidavits of merits, by which it was asserted that the note upon which this suit is predicated was, in fact, the personal note of the appellee and that the appellants signed the same as sureties thereon. An amended affidavit of merits was filed adding certain details which it is not necessary to discuss here.

In the Superior Court of Illinois
County of Cook
Petitioner, A. J. Hunter
Respondent

Left J. J. Hunter

Respondent

Respondent from the Circuit Court

vs.

of Cook County

J. J. Hunter, A. J. Hunter

Respondent from the Circuit Court

Respondent

Respondent

Respondent

This is an appeal from the Circuit Court of Cook County

presented by the respondent who were defendants in the trial

court, to reverse a judgment for the sum of \$100,000.00 and

costs.

The respondent filed the complaint with an order to show cause
alleging that he had obtained a fraudulent interest in the
sum of \$100,000.00, payable to the said respondent and
of Cook County, Illinois, as an inheritance from the estate of
Hunter, A. J. Hunter, A. J. Hunter and Hunter Trust Co.
that the respondent never failed to pay his share, and assigned
to show said amount paid to him and respondent filed suit to
recover the same as well.

The respondent attached the affidavit of this, stating

that substantially the same as above described.

The defendant filed a motion to set aside the

trial judgment of the court, on the ground that it was

not made with the will of the respondent, in fact, the

respondent made of the complaint on which the respondent stated

the same as above described. On motion of the respondent to

set aside the trial judgment of the court is in fact necessary to

Reverse same.

The appellee testified that he was sixty-nine years of age, lived on a farm and had been engaged in the farming business all of his life; that he owned certain lands and other property, including 400 shares of stock of the American Trust and Savings Bank; that he was acquainted with the defendants, three for a considerable period of time and one for only a short time; that he was a stockholder of the American Trust and Savings Bank and had served as a director thereof; that when such bank closed he yet owned his stock therein; that he was requested to sign a note for \$21,000.00, the proceeds of which were to be used by appellant, Charles Pratt, for the payment of 200 shares of stock of one Fred Legris; that the appellant, Huckins, had told the appellee that they were going to sell the stock; that appellee had nothing whatever to do with the purchase of the stock and had carried on none of the negotiations with the owner thereof.

He further testified that the appellant, Charles Pratt, told appellee he had purchased the 200 shares of stock and requested appellee to put the stock certificates in his box for safe keeping.

Exhibits #3, 4 and 5 purport to be stock certificates for capital stock of the American Trust and Savings Bank ~~xxx~~ issued to Fred E. Legris, Sr., and by him assigned in blank. Plaintiff's Exhibit #6 introduced in the evidence herein purports to be a receipt by appellant, Charles Pratt, for 200 shares of stock of the American Trust and Savings Bank. Plaintiff's Exhibit #7 purports to be an agreement or promise of F. E. Legris to deliver 200 shares of stock of such bank to appellant, Charles Pratt.

Trial was had before a jury in such court and resulted in a verdict in favor of the appellee for the sum above mentioned. Motion for a new trial was over-ruled and judgment entered on the verdict.

The appellee testified that on the afternoon of June 1, 1934, he lived on a farm on the west side of the town of ... near all of his life; that he owned certain lands and other property, including the house at which he resided during the ... and various other things; that he was acquainted with the ... three for a considerable period of time and one for only a ... time; that he was a shareholder of the American Trust and ... time (and he says) as a director (and he says) that ... bank close he had owned the above company; that on the ... owned it since the year 1900, the ownership of which was ... to be used by ... for the purpose of ... a series of stock of the ... that the ... had sold the ... that appellee had ... to the ... stock and had carried on the ... owner thereof.

It further testified that the ... bank ... sold appellee the ... and ... appellee ... the ... safe keeping.

Exhibit A, a ... for ... to ... Plaintiff's ... to be a ... stock of the ... by ... relative ...

That the ... a ... a ... for a new ... the verdict.

Various assignments of errors have been made by the appellants herein but we do not deem it necessary to discuss them separately.

It is urged by appellants that appellee was the purchaser of the stock issued to F. E. Legris Sr. and that therefore the note involved herein is his individual note. On the other hand appellee insists and with considerable testimony in support thereof, that such stock was purchased by appellant, Charles Pratt, either for himself or for all the appellants, and that he, appellee, signed such note merely as an accomodation maker.

The testimony bearing upon the facts in issue in this case is very conflicting and under such circumstances courts of this state have, on numerous occasions, announced the rule that where there is a conflict in the testimony of the witnesses upon the facts in issue, it is purely within the province of the jury to determine upon which side of the case the evidence preponderates. This rule is predicated upon reason as well as law. The jurors see the witnesses, hear the testimony given by each, observe their demeanor while testifying and are, therefore, in the best position to determine the credibility and weight to be attached to the testimony of the respective witnesses. These jurors sitting in their capacity as a jury have the responsibility placed upon them of passing upon the credibility of the respective witnesses and determining from the evidence all ultimate questions of fact and in such cases, where there is a conflict in the testimony, appeal courts will not ordinarily disturb their findings, unless such finding is manifestly against the weight of the testimony. Illinois Central Railroad Company vs. Gillis 68 Ill. 317; Lowry vs. Orr 1 Gilm. 70; Tolman vs. Race 36 Ill. 477; Halty vs. Markel 44 Ill. 225; Chicago City Railway Co. vs. Bohnow 103 Ill. App. 346; Calvert vs. Carpenter 96 Ill. 67; Shevalier vs. Seager 121 Ill. 564; Bradley vs. Palmer 193 Ill. 88; Lourance vs. Goodwin 170 Ill. 393.

From an examination of all of the evidence presented and of the exhibits, we are not willing to hold that the verdict herein is manifestly against the weight of the testimony and from a consideration

Various combinations of factors have been used in the past to determine whether or not a party is entitled to a new trial. It is not uncommon for a party to be granted a new trial on the basis of the fact that the jury was influenced by the testimony of a particular witness. In the case of a new trial, the court must consider the entire record and the testimony of all the witnesses. It is not enough to say that the testimony of a particular witness was false. The court must also consider the testimony of the other witnesses and the evidence as a whole. If the court finds that the testimony of a particular witness was false, it may grant a new trial. However, if the court finds that the testimony of the other witnesses is sufficient to establish the facts of the case, it may refuse to grant a new trial.

The testimony of a witness is a very important part of a trial. It is the only way that the facts of a case can be established. Therefore, it is very important that the testimony of a witness be accurate. If a witness's testimony is found to be false, it can have a significant impact on the outcome of a trial. In the case of a new trial, the court must consider the testimony of all the witnesses. It is not enough to say that the testimony of a particular witness was false. The court must also consider the testimony of the other witnesses and the evidence as a whole. If the court finds that the testimony of a particular witness was false, it may grant a new trial. However, if the court finds that the testimony of the other witnesses is sufficient to establish the facts of the case, it may refuse to grant a new trial.

These factors are all very important in determining whether or not a party is entitled to a new trial. The court must consider all of these factors and make a decision based on the evidence as a whole. It is not enough to say that the testimony of a particular witness was false. The court must also consider the testimony of the other witnesses and the evidence as a whole. If the court finds that the testimony of a particular witness was false, it may grant a new trial. However, if the court finds that the testimony of the other witnesses is sufficient to establish the facts of the case, it may refuse to grant a new trial.

From an examination of all of the evidence presented in the case, the court must determine whether or not a party is entitled to a new trial. It is not enough to say that the testimony of a particular witness was false. The court must also consider the testimony of the other witnesses and the evidence as a whole. If the court finds that the testimony of a particular witness was false, it may grant a new trial. However, if the court finds that the testimony of the other witnesses is sufficient to establish the facts of the case, it may refuse to grant a new trial.

of the whole we are of the opinion that the verdict of the jury herein is supported by evidence produced herein.'

Some criticism is made concerning the admission of certain evidence but we hold that under the issues presented the trial court did not err in its various rulings upon the admission of such evidence.'

The appellants also urge that there was error in the giving of certain instructions. We have examined the various instructions and do not believe they are subject to the criticism offered. Upon a whole we are of the opinion that the jury were fully and fairly instructed as to the law applicable to this case.

The judgment of the Circuit Court of Kankakee County is affirmed.

AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8591

2 #
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 606²

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 19 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the
APPELLATE COURT OF ILLINOIS
Second District

OCTOBER TERM, A.D. 1932.

Alemite Lubricator Company
of Illinois, Inc., a corporation,
Appellee

vs.

Appeal from the Circuit
Court of Winnebago County.

R. J. Bryhn, Inc., a corporation,
Appellant.

Baldwin, J.

The Alemite Lubricator Company, appellee (plaintiff in trial court) filed its suit in the Circuit Court of Winnebago County to recover the purchase price of certain machinery and materials sold to the appellant (defendant in trial court). Such action was predicated upon a written contract.

The appellant filed with its plea to the declaration, notice of certain defenses which amount to a contention of the defendant that there was an implied warranty, that the machinery purchased was reasonably fit for the purpose intended and that it was found that the machinery so purchased under such contract was not of such quality and that one of the motors exploded and injured other parts of the machinery.

It was further contended by the appellant that thereafter it had notified the appellee of such fact and not having received direction thereon the appellant repudiated its contract and asked for directions for disposal of the machinery.

The trial was had before a jury who returned a verdict for the plaintiff in the sum of \$791.48. Later a remittitur of \$39.50 was allowed and judgment entered for the sum of \$751.98. This appeal is prosecuted to reverse such judgment.

IN THE
COURT OF THE COMMONS
OF THE STATE OF
NEW YORK
JANUARY 1, 1881

ALBANY, NEW YORK, JANUARY 1, 1881.
TO THE HONORABLE SENATE,
OF THE STATE OF NEW YORK.

ALBANY, NEW YORK, JANUARY 1, 1881.
TO THE HONORABLE SENATE,
OF THE STATE OF NEW YORK.

ALBANY

ALBANY, NEW YORK, JANUARY 1, 1881.
TO THE HONORABLE SENATE,
OF THE STATE OF NEW YORK.

ALBANY

The Albany Institute of Science and Letters, organized in 1822, has been for many years one of the most prominent and useful organizations in the State. It has been the means of introducing many valuable improvements in the arts and manufactures, and of promoting the progress of science and literature. It has also been the means of securing the preservation of many of our most valuable natural resources, and of promoting the interests of the people in general.

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It is urged by appellant that the verdict of the jury is contrary to and not supported by the testimony. This objection relates to and is a question of fact. The courts of this State in a long line of cases have held that questions of fact are solely within the province of the jury to determine. In the case of *Mirich vs. Forschner etc.* 312 Ill. 343 Page 347 the court said: "On questions of fact where there is a conflict in the testimony, in actions at law, it is for the jury to weight and determine the evidence admitted by the court to be competent."

In The case of *Humphreys vs. East St. L. & S. Ry. Co.*, 253 Ill. App. 450 page 457 the court said: "Whether the plaintiff is right in his contentions, or the witnesses for the defendant, are proper questions of fact for the jury to decide. They had an opportunity to see and hear the witnesses upon the witness stand, and it is for them to judge which witnesses are credible and the ones to believe. They by their verdict have given more credence to the witnesses of the plaintiff, and unless it is manifestly against the weight of the evidence this court would not be justified for that reason in reversing the case. We cannot say that the finding of the jury is manifestly against the weight of the evidence in this case." Thus it is apparent that after a jury has by its verdict determined the questions of fact in issue, appeal courts will not reverse such determination unless the court is convinced that such verdict was manifestly against the weight of the testimony. The contract in this case contained a provision that the purchaser should have five days in which to inspect the machine and the evidence discloses that it was kept for a period in excess of four months. From an examination of all the evidence in this case we are of the opinion that the verdict of the jury is supported by a preponderance of the evidence introduced herein. Not only does this appear from the testimony alone but certain exhibits are produced by which the defendant, after the trouble complained of, acknowledged its obligation to pay the plaintiff.

It is stated in evidence that the weight of the evidence is contrary to and not supported by the testimony. This evidence relates to and is a question of fact. The weight of the evidence is a local fact of course and not a question of fact and solely within the province of the jury to determine. In the case of *Stinson v. Stinson*, 111 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is next urged by appellant that the proof did not correspond with the allegations. We have examined the declaration and the evidence and find no merit in this contention.

It is also urged that the court improperly modified certain instructions and gave certain other instructions that should not have been given. We have examined the instructions in the case and it is our judgment that the instructions given properly stated the law applicable to the cause of action under the allegations of the declaration and the theory upon which the case was tried. However, if such instructions were erroneous the appellant in this case cannot be heard to complain because it has failed to comply with Rule 16 of this court which requires all instructions, both given and refused, to be shown in the abstract. The abstract filed in this case shows only the instructions of which complaint is made. An examination of the record discloses that many other instructions were presented to and given by the court.

The judgment of the Circuit Court of Winnebago County is affirmed.

AFFIRMED.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

860-1

3 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 606³

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 19 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District

FEBRUARY TERM, A. D. 1933.

Laura Christie and John
Christie,
Complainants-Appellees,

vs.

Eddie Brouillette and Leona
Brouillette,
Defendants-Appellants.

Appeal from the Circuit
Court of Kankakee County.

Baldwin, J.

In his life time one John B. Brouillette was the owner of one hundred sixty acres of land in Kankakee County, situated near the Village of St. Anne.

At the time of his death on or about January 16, 1929, John B. Brouillette left his daughter, Laura Christie, one of the appellees herein, as his sole and only heir at law, his wife having died during the year 1914.

The appellant, Eddie Brouillette, is a nephew of John B. Brouillette and resided with him from the time he was approximately seventeen years of age. After his marriage to appellant, Leona Brouillette, the said Eddie Brouillette and his wife resided with the said John B. Brouillette upon the farm above mentioned and continued so to reside at all times thereafter during the life of the said John B. Brouillette.

The daughter, Laura Christie, after her marriage, had removed to the State of Kansas. John Christie is her only child and he is one of the appellees herein.

On September 13th, 1920 John B. Brouillette executed his

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6. *Principles of Mathematics*

warranty deed conveying to the appellant, Eddie Brouillette, the one hundred sixty acres of land mentioned and by the terms of such deed it was provided: "Subject, however, to the following conditions: Said grantee herein named to pay said grantor and his beneficiaries hereinafter named as follows: To said grantor, John B. Brouillette, the sum of \$600.00 per annum for and during his natural life, payable as follows:

\$300.00 on the first day of March and the first day of September in each and every year during the life time of said grantor; after grantor's death, grantee shall cause to be placed in trust the sum of \$6,000.00, the interest thereon to be paid to Laura Christie, daughter of said grantor, for and during her natural life, and should she die before her son John Christie becomes 30 years of age, then said interest on said sum of \$6,000.00 shall be paid to her said son, John Christie, until he shall become 30 years of age, at which time said sum of \$6,000.00 shall be given to said John Christie absolutely; the interest herein mentioned shall be payable semi-annually on the first day of March and first day of September of each and every year during the periods heretofore mentioned.

No payment herein mentioned to be made to said John Christie until after the death of his mother, Laura Christie, and if at the death of said Laura Christie, said John Christie is also dead then all payments herein mentioned shall be cancelled and null and void, said sum of \$6,000.00 to become the property of Eddie Brouillette the grantee herein.

Said grantor, John B. Brouillette, reserves the right and privilege to make his home with said grantee Eddie Brouillette, as heretofore, on payment of \$100.00 per annum, and in case of sickness on the part of said grantor, said grantee is to care for, nurse and attend to the wants of grantor at the home of grantee for a reasonable compensation to be agreed upon between grantor and grantee."

The said Eddie Brouillette accepted such deed of conveyance and so far as the evidence shows complied with the terms thereof until on or about June 22nd, 1928 when the appellants, Eddie Brouillette and Leona Brouillette, his wife, executed their warranty deed conveying the said lands above mentioned to the said John B. Brouillette and he on the same day made a new deed conveying the same premises to the said Eddie Brouillette, subject only to the condition of the payment of the sum of \$600.00 per annum to the grantor during his natural life and to his right and privilege of making his home with the grantee on the payment of the sum of \$100.00 per annum and such additional compensation as might be agreed upon.

After the death of the said John B. Brouillette, the appellant, Eddie Brouillette, refused to establish the trust in favor of the appellees according to the terms of the deed of September 13th, 1920 made conveying to him the lands above mentioned.

The appellees, Laura Christie and John Christie, daughter and grand-son of John B. Brouillette respectively, filed their suit in the Circuit Court of Kankakee County praying that the defendant, Eddie Brouillette, be ordered to pay to a trustee, whom the court should appoint, the said sum of \$6,000.00 in accordance with the terms and provisions of the said deed and that such payment be declared to be a lien upon the premises and praying that the income from the said fund be paid in accordance with the terms and conditions of said deed of September 13th, 1920 and in event of the failure of the appellant, Eddie Brouillette, to pay the said moneys to such trustee that the said real estate be sold and out of the proceeds thereof the said sum of \$6,000.00 be paid to a trustee.

The defendants filed their answer to such bill of complaint admitting the execution and delivery of the deeds above set forth, but denying that the complainants were entitled to the relief prayed or any part thereof.

The cause was heard by the court and at the conclusion thereof the court entered a decree ordering that the appellants have, under the deed of September 13th, 1920, an equitable lien upon the said real estate for the faithful performance of the covenants contained in said deed and further ordering that the deeds of June 22nd, 1928 from Eddie Brouillette and his wife to John B. Brouillette and from John B. Brouillette were to the said Eddie Brouillette were each subject to such equitable lien as was created by the deed of September 13th, 1920.

By its decree the court further appointed the City Trust & Savings Bank of Kankakee, Illinois, trustee to execute the provisions of the said trust contained in the deed and ordered the said Eddie Brouillette to pay to such trustee the sum of \$6,635.00 together with interest thereon at the rate of 5% per annum, within ninety days and to pay the costs of such proceeding. From this decree the said Eddie Brouillette and his wife prosecuted their appeal to this Court.

This court, upon examination thereof, having been of the opinion that the appeal was improperly taken to this court, transferred the same to the Supreme Court. The Supreme Court upon consideration thereof, having concluded that a freehold was not involved in this case, entered its finding to that effect and transferred the case to this court.

From an examination of the record in this case it is apparent that there is substantially no controversy as to the facts in the case. The sole and only question to be determined as we see the matter, is the effect of the conveyances herein referred to.

On behalf of the appellants it is urged that the effect of the re-conveyance of said premises by the said Eddie Brouillette to the said John B. Brouillette and his deed of June 22nd, 1928 again conveying such lands to Eddie Brouillette without reference

1. The Court ordered a decree that the plaintiff's claim for the value of the property be paid to the defendant.

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to the creation of such trust was to release and discharge the obligation of Eddie Brouillette to pay the \$6,000.00 and interest thereon to a trustee in accordance with the terms of the deed of September 13th, 1920. A determination of this question is the determination of the entire controversy.

By the deed of September 13th, 1920 the obligation to pay the said sum of \$6,000.00 to the trustee was, among other things, a part of the consideration of the said trust deed and upon the execution and delivery of the said deed the entire title to the said lands passed from the said John B. Brouillette to the said Eddie Brouillette subject, however, to the obligation or lien created by such deed.

No special language is necessary to create a trust estate nor to create a lien or charge upon real estate thereof but any conditions which reasonably indicate the intention of the grantor that such a lien or charge is intended to be created is sufficient. Sullivan vs. Sullivan 242 Ill. App. 501; Carder vs. Hughett 243 Ill. App. 170; Trubey vs. Pease 240 Ill. 513.

It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary and the disposition to be made of the property. (26 R.C.L. Sec. 18 P. 1181.)

The provision for the payment of the sum of \$6,000.00 to a trustee after the death of the said grantor was for the benefit of the said Laura Christie and her son and under certain conditions possibly for the ultimate benefit of said Eddie Brouillette. Immediately upon the execution and delivery of such deed the said Laura Christie became absolutely vested with the benefits to be derived from such trust when the same became operative and such benefit, estate or interest in said trust fund so acquired could only be defeated by the acts of the beneficiaries. Any act of the grantor and the grantee of the said deed would not and could not affect the right or interest which the beneficiaries had acquired in and to the benefits of the said trust so created.

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It is urged by the appellants herein that the interest which the said Laura Christie acquired was contingent because it is said that no interest could vest in her unless she survived John B. Brouillette. If such assertion were true we do not believe it would effect the situation. The provision creating the trust is clear and very specific. This trust is created regardless of the character of the interest of the beneficiaries. However, the mere fact that a beneficiary may die before enjoying the benefits of some estate created for him does not render the estate or interest so created for such beneficiary a contingent interest. It is not the uncertainty as to whether the beneficiary will live to enjoy the estate that renders an estate contingent.

As was said in the case of Scofield vs. Olcott 120 Ill. 362 page 371: "An estate is vested, when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin. A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent, and is, thereafter, invariably fixed to a determinate person. It takes effect in interest and right immediately upon the death of the testator, although it may not take effect, indeed, if it be a remainder, it can not take effect, in possession and enjoyment, until the death of the devisee for life, or other determination of the particular estate.*** It is the present capacity of taking effect in possession, if the possession were to become vacant, ~~before~~ and not the certainty, that the possession will become vacant before the estate limited in remainder determined, that distinguishes a vested from a contingent remainder. When the event, on which the preceding estate is limited, must happen*** that remainder is vested."

The right of enjoyment of Laura Christie was deferred only until the death of John B. Brouillette, which must happen and such postponement of enjoyment was for the purpose, under the terms of the said deed, of allowing him to retain the stipulated income for

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the period of his life. So far as the right to receive the income is concerned, the same thing is true of the interest of the appellant, John Christie.

In the case of Knight vs. Pottgeiser 176 Ill. 368 p. 374 the court said: "The testator desired the income and benefit of the property should be enjoyed by his widow as long as she should live, and for that reason invested her with the exclusive right of possession during her lifetime and deferred the right of remaindermen to enter into possession accordingly. Futurity was not annexed to the right of the remaindermen to possession, but only to the time when such right may be exercised. The postponement had reference to the situation or convenience of the estate, possession of the premises at once upon the death of the testator being denied the remaindermen solely because the testator desired his widow should enjoy the use and benefit thereof so long as ^{she} should live. An immediate right of present enjoyment is not essential to a vested remainder. It is sufficient if there is present a fixed right of future enjoyment."

"The same general principles, which regulate the vesting of devises of real estate, apply, to a considerable extent, to gifts of personality. But even though there be no other gift than the direction to pay or distribute in the future, yet, if such payment or distribution appear to be postponed for the convenience of the fund or property, as where the future gift is postponed to let in some other interest, for instance, if there is a prior gift for life*** and a direction to pay upon the decease of the legatee for life*** the gift in remainder vest at once and will not be deferred until the period in question." Scofield vs. Olcott 120 Ill. 362.

These rules of law are so well established and followed in this State that further citation of authorities would unduly extend this opinion.

the period of his life. It is to be noted that the right of the State to expropriate is not absolute, but is limited by the principle of the least damage to the individual.

In the case of the expropriation of the right of the State to expropriate, the State is not bound to compensate the individual for the loss of his property, but only for the loss of the right of the State to expropriate.

It is to be noted that the right of the State to expropriate is not absolute, but is limited by the principle of the least damage to the individual. The right of the State to expropriate is not absolute, but is limited by the principle of the least damage to the individual.

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This opinion.

It is urged by the appellant that the said Laura Christie received \$2,500.00 from her father's estate after his death. This is undoubtedly true, but we do not see that the receipt of such sum in any ways affects the provisions of the trust created herein. Certainly it is not established that the said Laura Christie accepted the said sum as a cancellation of any claim of the estate of her father.

But, it is urged by the appellants herein that the value of the land was much less at the time of the death of the said John B. Brouillette than it was at the time he made the deed on September 13th, 1920. This is probably very true but we are unable to see the materiality of such fact to the issues of this case.

The trust was created by the deed of September 13th, 1920 and having once been created and established no act of the grantor or grantee in the said deed could effect, alter or change the trust created nor the terms thereof.

The decree of the Circuit Court of Kankakee County is affirmed.

AFFIRMED

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8605

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 606⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 19 1933

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the
APPELLATE COURT OF ILLINOIS
Second District.

February Term, A.D. 1933.

The People of the State of
Illinois, ex rel. Carter
Euziere, doing business as
Leon Euziere Company,
Appellee,

Appeal from the Circuit
Court of Kankakee County.

vs.

William Rice, as Commissioner
of Highways of the Town of
Rockville, in the County of
Kankakee and State of Illinois,
Appellant.

Baldwin, J.

The appellee, Carter Euziere, doing business as Leon Euziere Company (relator in trial court) filed his petition to the May 1932 Term of the Circuit Court of Kankakee County, in which it was alleged that on March 29th, 1930 the appellee had recovered a judgment against the Commissioner of Highways of the Town of Rockville in said County, for the sum of \$1,290.18 and costs; that successive appeals of such judgment had been taken by such Commissioner of Highways and that such judgment had been affirmed by the Appellate Court and finally by the Supreme Court of the State of Illinois; that such judgment remains in full force and effect and no part of the same nor any of the costs have been satisfied.

That on the 23rd of August 1932 the relator served upon appellant, William Rice as such Commissioner of Highways, a written demand for the levying of taxes in an amount sufficient to pay such judgment and such written demand was set out in full in said petition.

It is further alleged that the defendant refused to comply with

the said demand and omitted to include said item in determining the taxes for road and bridge purposes, to be lieved on the property in said town and had refused to certify to the board of supervisors an amount sufficient to pay the judgment, interest and costs and had refused to include the same in his certificate to the County Clerk.

The petition further sets forth the equalized value of the property in the Town of Rockville for the year 1932, the rate of tax levied and other similar allegations and prayed a writ of mandamus directed to the said William Rice as Commissioner of Highways of the Town of Rockville, commanding him as such Commissioner to include in the determination of the taxes for road and bridge purposes an amount sufficient to pay the said judgment.

The defendant was duly served with summons and filed a general demurrer to the petition. This demurrer, upon hearing by the court, was overruled and the appellant having elected to stand by such demurrer, a decree pro confesso~~x~~ was entered upon the said petition and thereafter a decree entered by the court awarding a writ of mandamus to the petitioner, directing the said appellant as such Commissioner to levy and certify to the board of supervisors of Kankakee County a tax of a sufficient amount to pay the relator's judgment, interest and costs and to comply in all particulars with the statute in properly making such levy.

The appellant excepted to said decree and appealed such case to the Supreme Court of this State and such court on consideration thereof certified the same to this Court.

The appellant has assigned several reasons for the reversal of such judgment and order of the court, but in view of the conclusion we have reached in this matter it is not necessary to discuss each assignment.

It is contended by appellant that a commissioner of highways is without power to levy a tax except on the identical date fixed by statute and that such date having passed the court was without power to order him to extend such tax. If such contention was correct then a commissioner of highways might, under the statute, defeat

any or all honest claims against him, even though such claims were reduced to judgment, by the mere failure to act in certifying a tax to pay same and by finding some other way of spending the money to be received from the tax so levied. Such contention cannot be sustained. Municipal corporations, and its officers, are as well required to pay their honest obligations as any individual and if they do not do so voluntarily it is the right of the aggrieved person to apply to an appropriate court to compel such municipal corporation or its officers to pay such obligations.

A similar question was raised in the case of Board of Supervisors vs. The People 226 Ill. 576 page 580 and the court in passing upon the question said: "The proposition that an inferior tribunal which has refused to perform a positive official duty at the time when it is legally required to do so cannot, by adjourning its meeting, place itself beyond the coercive power of the courts to compel the performance of the duty enjoined by law, but it may be compelled by mandamus to re-assemble and perform its legal duty, seems too clear for argument. (Lowenthal vs. People 192 Ill. 332). In the case of People vs. Board of Supervisors 185 Ill. 288 we said (page 293): 'It is the general rule mandamus will not be granted in anticipation of a default or failure of official duty, and if the writ may not be availed of after the omission or failure has occurred, the writ will become inoperative in all such cases as the one at bar.' Again, in Board of Supervisors vs. People 226 Ill. 576 page 581 the court said: 'While it may be that the Board of Supervisors could not, of its own motion, levy a tax for county purposes except at the September meeting, still if it failed and refused to do so at that time the power of the court could be invoked to compel the performance of that duty.' In the case of State Board of Equalization vs. People 191 Ill. 528 the board was compelled by mandamus to re-convene after its final adjournment and assess certain omitted property."

It is also urged by the appellant that the Commissioner of Highways can only determine such amount of money as is needed for road and bridge purposes and that the court cannot tell him how to exercise that discretion so long as he acts in good faith. Counsel for appellant has misconceived the point in this case. There is no question presented by this record of any interference of any discretionary power of the commissioner. The question in this case concerns the performance of the duty of such highway commissioner to provide for the payment of the judgment mentioned. The petition is not to control the discretion of the appellant, but to compel the levying of sufficient tax to pay the judgment.

It is the duty of the appellant as commissioner of highways to pay such judgment and he does not possess ~~any~~ any discretion in the matter. The commissioner had had his day in court, had made his defense to the judgment and it had been finally and conclusively decided adversely to him. It, therefore, follows that it is his duty to pay such judgment and his failure to do so is not an abuse of discretion but an abuse of duty.

The writ of mandamus issued in this case ordered this commissioner to provide the necessary fund for the purpose of paying such judgment. It did not, in any particular, undertake or purport to dictate to him ^{any} other or further levies. It follows, therefore, that this contention is without merit.

But it is urged that the commissioner of highways can only levy a tax for the "construction, maintenance and repairs of roads and bridges" and that a judgment against the commissioner is not within the statute. It is not the policy of law to deal in absurdities, and such contention cannot be sustained.

We have examined the record carefully and upon consideration of all the facts and circumstances in this case hold that the objections of the appellant are not well founded.

The decree of the Circuit Court of Kankakee County is hereby affirmed.

STATE OF ILLINOIS. }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8608

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 606⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 19 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1933

B. A. Schmahl,

appellee,

vs.

Appeal from the Circuit Court

A. F. Jeanblanc, Harry B. Eaton,
August Bohn, Maurice Hokanson
and True Bloom, partners doing
business as Hokanson and Bloom,

of Lee County

appellants,

Baldwin, J.

The appellee, complainant in trial court, filed his bill of complaint in the Circuit Court of Lee County, in which he alleged; that an election had been held in an alleged Community High School District No. 251 of Lee County, Illinois, concerning the establishment of such high school district and that at such election the proposition carried; that A. F. Jeanblanc, Harry B. Eaton, August Bohn, Bowden Jessee and Peter Montavon were assuming to act as Board of Directors of such high school district; that such district was not a legal and valid district; that the territory thereof was not contiguous and compact; that the children of such district could not go and come to said school because of the fact that a river flowed through the purported district and that such river cut off many families; that such district could not support and maintain a high school; that to do so would require taxation amounting to confiscation of property; that on May 19, 1931 the People of the State of Illinois on relation of J. P. Woodrow, et al, filed a proceeding in the nature of quo warranto in the Circuit Court of Lee County challenging the organization of such Community High School District No. 251 and denying the legality and validity of the district; that the appellants had passed a resolution levying

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a tax upon such district to secure moneys to erect a community high school building and that such assessment had been extended upon the tax books and that anticipation warrants had been issued against such tax levy and the defendants had entered into a contract with an architect for the furnishing of plans for a building to be erected upon a tract of land formerly owned by District 92, which had been purchased by the defendants for said district for the sum of \$10.00.

The bill of complaint prayed that an injunction be issued restraining the defendants from incurring any liability, purchasing materials or employing persons to work on the construction of the school building or permitting the same to be constructed or used by the Community High School District No. 251 and from borrowing money until the final disposition of the quo warranto suit described in the said bill of complaint.

The bill of complaint was filed on September 30, 1932 and on the same day a writ of injunction was issued by the court without notice or hearing thereon and without bond, restraining the defendants from incurring any liability, purchasing any materials, employing any persons to work in the construction of any school building** in Community High School District No. 251 until the final disposition of the quo warranto suit referred to in the bill of complaint.

Defendants were served on September 30, 1932, and filed their answers in the said court on October 6th. On the same date defendants presented to the court their motion supported by affidavits for the dissolution of the injunction issued as above set forth, which motion was, on November 19th, 1932, overruled by the court and this appeal is prosecuted to reverse such action.

It is apparent from the record in this case the quo warranto suit above mentioned was filed some sixteen months prior to the time of the filing of this bill of complaint. It is also established by the record that a demurrer had been filed to petition in such quo warranto proceeding and that no further proceeding was had in connection therewith.

A proceeding in the nature of quo warranto is the proper and appropriate remedy or action to try the right to a public office, of which there is a defacto incumbent, (Launtz vs. People 113 Ill. 137). It is also an appropriate and proper proceeding by which to test the validity or legality of a

municipal corporation, (Kamp v. People, 141 Ill. 9) and a majority of the cases hold that validity of the organization of a municipal corporation or political subdivision of the state can only be tested by such proceeding.

The office of a bill in equity is to obtain relief in cases where no other adequate remedy exists and courts of equity do not ordinarily assume jurisdiction of any case where adequate relief is to be had in other actions or courts.

The relief prayed in this case appears to be a request to enjoin the defendants from exercising their powers or performing their duties as officers of such alleged school district until such time as the quo warranto suit filed long prior thereto should be determined. A careful examination of the bill of complaint leads to the conclusion, however, that this suit is in effect an attempt to procure a determination of the validity or legality of the organization of such school district. As we have already indicated such a determination is not a proper function of a court of equity where an adequate remedy is otherwise provided. This question can properly be determined upon the hearing of the quo warranto case already filed or by the appellee filing such a proceeding directly for such purpose.

From a consideration of the allegations of the bill of complaint and the facts as disclosed by the record herein we conclude that the case made by the pleadings was not such a case as would entitle the complainant to an injunction, and the court erred in granting a temporary injunction. Under the record the court should not have granted a temporary injunction without notice or without the complainant filing a bond.

The order of the court granting a temporary injunction herein is reversed and the cause remanded to the Circuit Court of Lee County with directions to dissolve such injunction and dismiss the bill of complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8618

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 607¹

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 18 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A.D. 1933

F. C. Harrison,

appellee,

vs.

Appeal from the Circuit Court

of Winnebago County

W. G. Michaelsen,

appellant,

Baldwin, J.

The appellee, F. C. Harrison, filed this suit in the Circuit Court of Winnebago County against the appellant, W. G. Michaelsen for non-payment of a note in the sum of \$1500.00.

The appellant filed his general issue to the declaration, together with affidavit of meritorious defense. Thereafter the case was tried in such court before a jury upon the issues as formed by the pleadings.

On the trial the appellee offered in evidence, without objection, the note sued on. He then offered other competent testimony as to the amount of accrued interest thereon. The appellant called the appellee to the witness stand and making him his own witness examined him concerning the note involved in this suit and as to the consideration paid therefor. Thereafter the appellant offered to make proof of other matters which we do not deem necessary to discuss.

The note in question, dated December 5th, 1930 for the principal sum of \$1500.00 due ninety days after date, was payable to the order of the Montana-Eastern, Ltd., a corporation. Exclusive of the printed part thereof such note was in the handwriting of the appellant. Endorsed upon the note was the notation "Depositing with Mr. Paul Stich for collateral one certificate for 300 shares of Montana-Eastern Limited."

In the case of the State of Illinois

Second District

February Term, A.D. 1907

J. G. Harrison,

appellee,

against

vs.

J. G. Harrison,

appellant,

appeal.

Edwin J.

The appellee, J. G. Harrison, filed this appeal in the

Second District of Illinois, against the appellant,

J. G. Harrison, for non-payment of a note in the sum of

\$1500.00.

The appellee filed his general answer to the bill of

the appellant with this bill of exceptions between the

after the case was tried in such court before a jury and

before the trial of the case.

On the trial the appellee offered in evidence, among

other things, the note and bill. The same were duly

admitted by the court and the jury returned a verdict

in favor of the appellee. The appellee then moved for

judgment in his favor on the ground that the jury

in the trial of the case was improperly constituted.

The court refused to grant the motion and the jury

returned a verdict in favor of the appellee.

The bill is amended, and the case is set for trial

on the 10th day of March, 1907, at 10 o'clock A.M.

and in the case of the State of Illinois, 1907, 1st

Exclusive of the original and the copy of the bill

and the bill of exceptions. The case is set for trial

on the 10th day of March, 1907, at 10 o'clock A.M.

certificates for 500 copies of the bill of exceptions.

Such note was endorsed by the Montana-Eastern, Ltd., by H. O. Aaberg, Vice Pres., guaranteeing payment at maturity to the holder thereof.

When the appellant called the appellee as a witness he thereby vouched for the truth of his testimony. In our opinion the testimony in this case, as disclosed by the record, is sufficient to show that appellee was the owner in due course of such note.

The evidence offered in this case, taken as a whole, shows beyond any question that the appellee herein was a holder in due course of the note in question, as defined by the Negotiable Instrument Act of this State, and none of the testimony introduced or offered by the appellant herein tended in any degree to controvert such fact, but on the contrary tended to prove that the appellee was, in fact, a holder of the said note in due course.

If as apparently contended by the appellant herein, that the appellee was not a holder in due course, such fact would be a matter of defense, which must be proven by the defendant in this case. No such testimony was introduced or offered.

The judgment of the Circuit Court of Winnebago County is affirmed.

AFFIRMED

Such notes are submitted by the Government. It is to be noted that the Government has not submitted any evidence in support of its claim.

When the Government called the evidence to which it has referred, it merely stated that the facts of the testimony. It has not stated the testimony in full, as required by the rules, but has merely stated that the facts of the testimony are such as to show that the Government is not entitled to the relief it seeks.

The evidence offered in this case, taken as a whole, shows beyond any doubt that the Government is not entitled to the relief it seeks. It is the duty of the court to decide the case on the basis of the evidence presented, and it is the duty of the court to decide the case on the basis of the evidence presented. The evidence presented by the Government is not sufficient to establish its claim, and the court is therefore of the opinion that the Government is not entitled to the relief it seeks.

If it is possible to establish that the Government is not entitled to the relief it seeks, then the court is of the opinion that the Government is not entitled to the relief it seeks. The evidence presented by the Government is not sufficient to establish its claim, and the court is therefore of the opinion that the Government is not entitled to the relief it seeks. The evidence presented by the Government is not sufficient to establish its claim, and the court is therefore of the opinion that the Government is not entitled to the relief it seeks.

Very truly,
Your obedient servant,
J. H. H.

WITNESSES

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8673

77

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

271 I.A. 607²

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 19 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1933

S. T. Jackson, et al,

Defendants in error,

vs.

Writ of Error to the Circuit

A. E. Anderson, and The Belt
Route Warehouse and Storage
Company,

Court of Kankakee County

Plaintiffs in error,

Baldwin, J.

On April 19th, 1932 the complainants filed their bill of complaint in the Circuit Court of Kankakee County alleging that they were stockholders of the Belt Route Warehouse and Storage Company; that such company was incorporated November 17th, 1925 under the laws of the State of Illinois; that they were solicited to purchase stock of such corporation and paid therefor the sum of \$100.00 per share; that on November 27th, 1925 certain officers of the company issued to one A.E. Anderson certificates for 50 shares of common stock and for 50 shares of preferred stock of such corporation without receiving in return therefor the purchase price of \$10,000.00 and that such officers caused to be inscribed in the books of the corporation a statement that said 100 shares of stock had been paid in full.

Complainants further alleged that they were unaware of the circumstances until about September of 1931 when an independent audit of the corporation's books revealed the circumstances and the issuance of the stock to the said Anderson without the payment of the purchase price.

The bill further alleged demand upon Anderson to return the stock for cancellation and his refusal so to do.

1. The Special Agent of Illinois

General Agents

February 1935, A. M. 1935

S. T. Jackson, et al,

Defendants in error,

vs.

State of Illinois

A. E. Anderson, et al, The State
Route 100 and 1000
Company,

Plaintiffs in error,

Belleville, Ill.

On April 1935, 1935 the undersigned filed with the

complaint in the Circuit Court of Lawrence County, Illinois, that

they were stockholders of the State Route 100 and 1000

Company; that said company was incorporated November 1934, 1934

under the laws of the State of Illinois; that they were not

in business stock of such corporation and said the same was

of \$100.00 per share; that on November 1934, 1934 certain

officers of the company issued to one A. E. Anderson certificates

for 50 shares of common stock and for 50 shares of preferred

stock of such corporation without receiving in return therefor

the purchase price of \$10,000.00 and that such officers caused

to be inserted in the books of the corporation a statement

that said 100 shares of stock had been paid for.

Complaints were filed with the undersigned

the undersigned with copies of the same of 1935 when the same

condemned and of the corporation were received by the undersigned

and the undersigned of the same of the same of the same of the same

without the payment of the purchase price.

The bill further alleged damages to the same of the same

the same for the same of the same of the same of the same

The corporation answered the said bill of complaint, admitting its incorporation and neither admitting or denying the remainder of the allegations. The defendant, A.E. Anderson, also filed his answer setting forth certain facts and circumstances and denying that relief should be granted.

The cause was heard upon the bill and answer. On the 27th day of September, 1932, the court entered a decree finding that the said defendant, Anderson, with other persons, had entered into an agreement on April 28th, 1925 to purchase certain warehouse property from the Cook Motor Corporation for the sum of \$45,000.00 which was to be payable \$15,000.00 in cash and \$30,000.00 in notes to be secured by a mortgage on same.

That by the terms of said agreement the said Anderson was to furnish the cash and thereafter the property was to be sold for the sum of \$75,000.00 and out of the sale price the said Anderson was to be repaid the \$15,000.00 so advanced and to receive one-third of the prospective profit of \$30,000.00.

That in event such sale was not made a corporation should be organized with a capital stock of \$100,00.00 and that said Anderson should be repaid the \$15,000.00 so advanced and to receive paid up stock of \$10,000.00 par value.

On April 29th, 1925 the parties made a supplemental contract by which they each agreed to pay one-third of the expenses of the selling of said property.

The court further found that Anderson borrowed the sum of \$15,000.00 from the City National Bank of Kankakee and applied the same on the purchase price of the property and a deed conveying such property was executed and delivered to one F. L. Shidler, who in turn executed 30 notes for \$1,000.00 each, all secured by a mortgage upon the property, to secure the remainder of the purchase price.

Thereafter the contemplated sale was not made and the Belt Route Warehouse and Storage Company was organized with a capital stock of the \$150,000.00, of which \$125,000.00 par value was common stock and \$25,000.00 par value was preferred stock.

The said property, which had been so conveyed to said Shidler, was transferred to this corporation at a valuation of \$115,000.00 less the mortgage indebtedness. The capital stock of the par value of \$25,000.00 was sold and paid for in cash. One F. L. Shidler was elected president of the corporation and M. T. Jackson secretary and treasurer thereof. Four Hundred twenty-five shares of capital stock of such corporation of a par value of \$42,500.00 was issued to F. L. Shidler and the same amount to M. J. Jackson and fifty ~~xxxxx~~ shares of common stock of the par value of \$5,000.00 and 50 shares of preferred stock of the par value of \$5,000.00 was issued to the said A. E. Anderson; the stock so issued to Shidler and Jackson was issued against the increased valuation placed on the warehouse property and was issued without consideration; both of said parties returned all of such stock to the corporation and certificates for such stock had been cancelled; the defendant A.E. Anderson, did not pay the corporation any sum whatever for the capital stock issued to him and that he now holds all of said stock.

The court further found that the complainants had not been guilty of laches in the prosecution of the suit and had not ratified, acquiesced or consented to the issuance of the stock to, or the retaining thereof by the said defendant, A. E. Anderson, and that the issuance thereof was a fraud upon the rights and interests of the stockholders of the corporation and ordered that the stock so issued without consideration to the said A. E. Anderson should be declared ^{the} void and/certificates thereof cancelled. The court ordered that Anderson should be given the opportunity to pay the said sum of \$10,000.00 for said stock if he so elected and entered an order that the said

Thereafter the corporation sold the stock and the
Monte Corporation an amount of \$100,000.00 was paid for the
stock of the \$100,000.00, of which \$10,000.00 per value was
stock and \$90,000.00 per value was interest stock.
The said property, which had been so conveyed to said
Scriber, was transferred to this corporation at a valuation of
\$115,000.00 less the interest indebtedness. The interest stock
of the value of \$15,000.00 was sold and the balance of
One \$1.00 Scriber was allowed president of the corporation and
A. L. Jackson secretary and treasurer thereof. The interest
Twenty-five shares of capital stock of said corporation of
per value of \$1,500.00 was issued to A. L. Jackson and the
same amount to A. L. Jackson and fifty shares of interest
stock of the value of \$5,000.00 and 50 shares of interest
stock of the value of \$5,000.00 was issued to the said A. L.
Anderson; the stock so issued to Scriber and Jackson was issued
against the increased valuation placed on the warehouse property
and was issued without consideration; both of said parties
returned all of said stock to the corporation and Scriber
for such stock had been cancelled; the documents A. L. Jackson
did not pay the corporation any sum whatever for the said
stock issued to him and that he now holds all of said stock.
The court found that the corporation had not
been guilty of fraud in the prosecution of the suit and that
not entitled, according to the evidence in the case, to the
stock to, or the interest thereof in the said debt.
A. L. Jackson, and that the increased interest was a loan made
the rights and interests of the said parties of the corporation
and ordered that the stock so issued without consideration to
the said A. L. Jackson should be cancelled and the interest
thereof cancelled. The court ordered that Anderson should be
given the opportunity to pay the said sum of \$10,000.00 and that
unless it be so directed and entered in order that the said

Anderson pay or cause to be paid to the said corporation the said sum of \$10,000.00 within thirty days from the entry thereof and in default thereof that the two certificates representing the stock so issued to him without consideration be declared void. The plaintiffs in error, who were the defendants in the trial court, have prosecuted this suit to reverse such decree.

It is urged by the plaintiffs in error that the complainants have a complete and adequate remedy at law and therefore, cannot maintain this suit.

This assignment appears to be predicated upon the fact that at a meeting of the stockholders in 1931 the defendant, Anderson, is found to have admitted that such stock was issued to him without consideration and that he offered to return half of the stock for cancellation and to pay for the other half. It could not seriously be contended that an unaccepted offer of this character amounted to such a contract as could or would be enforced at law, but whatever may be the fact, the question is not exactly new in this state.

In *Stebbins v. Perry County*, 167 Ill. 567, p. 574 the court said concerning the issuance of stock not authorized by law: "Equity has ample power to cancel even over-issued stock. * * * The stock in this case, however, is something more than merely over-issued stock. It is stock the issuance of which was forbidden by law. It is not of that class alluded to in most of the cases which deal with over-issued stock, where the acts complained of were merely *ultra vires* or outside or beyond existing powers. It being stock improperly issued, it creates a cloud upon the rights of other stockholders, and the right to have such cloud removed is a continuing one, that may be asserted at any time during the existence of the cloud."

Again, it is urged that no demand was made upon the directors of the corporation to begin a suit.

another day or cause to be paid to the bank corporation the
said sum of \$10,000 within thirty days after the date of the
and in default thereof that the bank corporation should be
stood as liable to him without obligation to deliver any
the certificate in return, and that the certificate in the bank
court, have prosecuted it in suit to recover said amount.
It is urged by the plaintiff in return that the bank
and have a certificate and amount of money in the bank
cannot maintain this suit.

This defendant answers that the bank upon the fact
that at a meeting of the stockholders in 1901, the defendant,
defendant, is found to have admitted that such stock was issued
to him without consideration and that he offered to return said
of the stock for consideration and to pay for the same.
It could not certainly be contended that an admission that
of this character amounted to such a contract as would be binding
be imposed on him, but defendant says on the fact, the admission
is not exactly what is in this case.

In *Shelton v. Perry*, 100 Ill. App. 2d 424, the court
said concerning the issuance of stock and authorized to sell:
"The bank has only power to cancel even non-assessable stock."
The stock in this case, however, is not non-assessable stock.
over-assessable stock. It is also the issuance of stock and the
other to him. It is not at all clear that it is the
the bank which had the right to cancel, which is the
cancelled of stock which after times of retention of stock and
being received. It seems that the bank is not authorized
claim upon the return of stock which is not the case.
have such stock returned is a question of law, and not of fact.
at the time during the issuance of the stock.
bank, it is urged that the bank was authorized to
issuance of the corporation to cancel it.

In Stebbins v. Perry County, supra, page 574, the court said: "As a general rule, a stockholder cannot bring a suit to enforce a property right of a corporation without a prior demand upon the corporation to do so in its own name. But to this general rule there are exceptions. * * * where the object of the action was to compel a corporation to cancel certain shares alleged to have been unlawfully issued. * * *" It thus is apparent that such a demand is not necessary in all cases. In this case, however, the corporation filed its answer to the bill of complaint and cannot now be heard to raise this question.

It is also urged that the findings of fact do not conform to the allegations of the bill. This objection does not appear to have been raised in the trial court and in such cases the objection cannot be raised in this court.

Finding no error in the record the decree of the Circuit Court of Kankakee County is affirmed.

AFFIRMED.

In *Robinson v. Gray*, 100 U.S. 268, 12 S.Ct. 106, 33 L.Ed. 106, the Court said: "As a general rule, a corporation cannot sue or be sued in its own name. But in this general rule there are exceptions, and one of them is that of the action for the recovery of a corporation's property. In such cases the corporation is to be treated as a natural person, and it is not necessary to state in the complaint that such a demand is not necessary in all cases. In this case, however, the corporation filed its answer to the bill of complaint and cannot now be heard to raise this question. It is also urged that the finding of fact in the answer to the allegations of the bill. This contention does not appear to have been raised in the trial court and in any case the objection cannot be raised in this court. Finally no error is shown in the record in the decree of the Circuit Court of Appeals, and the decree is affirmed."

RECEIVED

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8560

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 607³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

MAY 25 1933

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

Al Simon,

(Plaintiff) Appellee,

vs.

Appeal from Circuit Court,
Lake County.

Deibler Motor Car Corporation,
a Corporation, (Defendant)
Appellant.

WOLFE--P.J.

This case involves the right of recovery by appellee against the appellant for a sum of money, namely; \$360.00 which was the price for which appellant sold an old car of the appellee's. The appellant retained the money under and by virtue of an agreement as claimed by the appellant between it and the appellee. It is also claimed by appellant that the said sum should apply on a new Plymouth automobile which they were to obtain for the appellee. The first agreement was made in November 1930. The appellee delivered his car to the appellant and after some work was done on the old car it was sold by the appellant for the sum of \$360.00. At the time of the first transaction the appellant was not able to deliver the new Plymouth car to the appellee as it did not then have any of the cars in stock. Things ran along for quite a while and the car did not come.

In May, 1931, appellee in order to make use of his credit in trade went to the appellants place of business and after some discussion regarding make a deal on a certain other automobile, one of the salesmen of the appellant company agreed to make some arrangement by which a car would be provided. He was to call up the appellee relative thereto. There was some further communication back and forth between the parties about the matter, but no car was ever furnished to the appellee. The appellee claims that he procured a customer by the name of Eisendrath,

IN THE
APPELLATE COURT OF THE DISTRICT OF COLUMBIA
JANUARY TERM, A.D. 1932.

At the

(Plaintiff) Appellee,

vs.

Decker Motor Car Corporation,
a corporation, (Defendant)
Appellant.

Argued by the Plaintiff's Counsel,
Late January.

WORTH-P. U.

This case involves the right of recovery of money paid by the appellant for a car of money, namely, \$200.00 which was the price for which appellant sold on his car of the appellant. The appellant retained the money under and by virtue of an agreement to sell by the appellant to the appellant. It is stated that the appellant appellant that the said car should only be a new vehicle, and that which they were to obtain for the appellant. The three payments were made in November 1930. The appellant delivered the car to the appellant and after some work was done on the car it was sold by the appellant for the sum of \$200.00. At the time of the sale the appellant the appellant was not able to deliver the car to the appellant. The appellant is it did not turn out as of the car in stock. The appellant along for quite a while and the car did not come.

In May, 1931, appellant in order to take care of the matter in trade went to the appellant's place of business and there was discussing regarding the deal on a certain other automobile. One of the men of the appellant agreed to sell the car to the appellant. The car would be provided. He was the car of the appellant's car. There was some further discussion about the car and the appellant about the matter, but the car was not delivered to the appellant. The appellant of the car was not delivered to the appellant.

who placed an order with the appellant for a new Plymouth automobile. There was some discussion between the appellee and appellant as to whether appellee had procured this customer.' The result of these meetings and communications was that the appellant agreed to honor appellee's credit in trade in the transaction with Eisendrath.' It was the contention of the appellant that some time later Eisendrath stated that he could not wait any longer for the delivery of a new Plymouth car which had been ordered from the factory, and that the transaction with Eisendrath was terminated.' There is evidence that other attempts were made to make a deal between the parties, but they were never consummated.'

The appellee started suit against the appellant in a Justice of the Peace's court to recover the amount of \$360.00, the sale price of his car which he had delivered to the appellant and for which he took a credit slip for that amount the same to be applied on the purchase ^{price} of a new car.' The case was appealed to the Circuit Court and tried, which resulted in a verdict in favor of the appellee for \$360.00.' A remittur of \$60.00 was entered by the plaintiff and the judgment for the plaintiff was then entered in the sum of \$300.00.'

It is urged that the Bill of Particulars was such that the appellee should not be permitted to recover in the case because he undertook to state one cause of action in the Bill of Particulars but recovered upon a different cause of action. In suits before the Justice of the Peace no written pleadings are required.' After an examination of the Bill of Particulars filed in this case we are of the opinion that the contention of the appellant is not well founded and that the Bill of Particulars is broad enough and the proof sufficient to sustain a verdict.

It is also urged by appellant that the court should have directed a verdict in its favor as the evidence is not sufficient to support the verdict.' This is a proper question of fact for the jury to decide.' From an examination of the testimony of the various witnesses we are of the opinion that the proof preponderates in favor of the appellee and that we would not be justified in setting aside the verdict on the ground that it is contrary to the manifest weight of the evidence.'

The court did not err in refusing to direct a verdict in favor of the appellant.

In the case of McKinnie vs. Lane 230 Ill. Page 544, McKinnie sold some pictures to Lane. Part of these were sold for cash and the balance of the purchase price of these pictures was to be taken by McKinnie in pictures from Lane. The pictures that McKinnie was to receive were never delivered to him, and he demanded either the pictures or the balance of the money representing the sale price of the pictures he had sold to Lane, but Lane refused either to deliver the pictures or to pay him the cash. Suit was brought by McKinnie. The only pleadings were the common counts and the general issue. In this case the court laid down the rule that, If no date for the delivery of specified articles of personal property in payment of a certain amount is fixed in the agreement the law will imply that the delivery is to be made upon demand or within a reasonable time, and if the obligor refuses to deliver the property in a reasonable time after demand he is liable in money for the amount due.

We think the reasoning of the court in the McKinnie case is very applicable to the case at bar. It should be kept in mind that the appellant sold the automobile of the appellee and received \$360.00 therefor. At the time of the institution of the suit that the appellee had neither the money which represented his old car nor another automobile.

Complaint is made relative to the instructions, but after an examination of the pleadings and the instructions given we have arrived at the conclusion that they fairly state the law, and that substantial justice has been done in this case. The judgment of the Circuit Court of Lake County should be, and is, hereby affirmed.

Judgment affirmed.

... ..

3. 11. 1953

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

some pictures in London. Part of these were sold for cash and the balance of the pictures was to be sold in London.

of certain of the other persons who were present at the time of the shooting. The only person who was not present at the time of the shooting was the person who was shot. The person who was shot was the person who was shot.

9220

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8568

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 607⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

Katherine Harris, et al.,

Appellants

vs.

Appeal from Circuit Court,

DuPage County.

Nicholas Hildebrandt,

Appellee.

WOLFE--P.J.

Katherine Harris and Charles Harris instituted proceedings in the Circuit Court of DuPage County against Nicholas Hildebrandt, et al. by filing a bill in equity praying for an injunction and restraining order to enjoin Hildebrandt from declaring a forfeiture on a contract for deed. To this bill Hildebrandt, the appellee, filed a general demurrer. On a hearing before the court the demurrer was sustained, and the bill dismissed for want of equity. The Appellants elected to stand by their bill and prosecuted the case in this court to review the action of the trial court in sustaining the demurrer and in dismissing their bill. The only question involved in the case is the sufficiency of the bill and whether the matters and things alleged and set forth constitutes a meritorious cause of action.

It is first urged by the appellant that the court erred in dismissing the bill for the reason that it states that thirty days notice of the intention to forfeit the contract should be served upon the vendees under the articles of agreement for a warranty deed. Before a forfeiture could be declared. They cite Cahill's Illinois Revised Statutes of 1931, Sec. 3, Par. 3, Chapter 57 to sustain their contention. This statute was passed and became a law after the appellee had declared a forfeiture of the contract, consequently the statute is not applicable to this case.

IN THE
APPELLATE COURT OF INDIANA
SECOND DISTRICT
February Term, 1911.

Katherine Harris, et al.,

Appellants

vs.

Nicholas Wilschmidt,

Appellee.

WOLF--F. J.

Katherine Harris and Nicholas Harris instituted proceedings in the Circuit Court of DePue County against Nicholas Wilschmidt, et al. by filing a bill in equity praying for an injunction and restraining order to enjoin Wilschmidt from dealing in real estate on a contract for deed. To this bill Wilschmidt, the appellee, filed a general demurrer. On a hearing before the court the demurrer was sustained, and the bill dismissed for want of equity. The facts elicited to stand by their bill and proceeded to file in this court to review the action of the trial court in sustaining the demurrer and in dismissing their bill. The case was reversed in the case as the sufficiency of the bill and whether the contract and things alleged and set forth constituted a satisfactory cause of action.

It is first urged by the appellant that the court erred in dismissing the bill for two reasons: first it states that notwithstanding the intention to foreclose the contract should be given upon the vendees under the articles of agreement for a warranty deed before forfeiture could be declared. They cite *Wells v. Wells*, 11 Ind. 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is a well settled rule of law that a judgment of law will not be enjoined by a court of equity unless the complainant shows that he has a good defense upon the merits; that he was prevented from making his defense by the fraud of the opposite party, he at the time being without negligence, or that the plaintiff in the common law suit had no cause of action. The bill in this case does not show that the complainants have any legal defense in the case, or they were prevented from making any defense that they might have interposed at the former hearings, or that the plaintiff had no cause of action at that time. In the case of Telford vs. Brinkerhoff, 163 Ill. 439, the court, in discussing a similar matter says: "A bill in equity to stay proceedings at law after judgment is always examined with jealous scrutiny. The general rule is, that no relief will be granted where the matter, upon which the claim to relief is founded, was litigated in the original action." Accordingly where a party moves for a new trial and fails, he cannot then upon the same facts apply to the same judge for an injunction and re-try his case in equity." It is also well settled, that a party who seeks to enjoin a judgment must show that he himself has a good defense to the merits, or that the plaintiff had no cause of action."

In the appellants' argument they state the general proposition of law that, "A general demurrer should not be sustained if the bill sets forth any claim whatever proper for equitable relief." No doubt as a general proposition this is a correct statement of a rule of law, but the appellants in their argument wholly failed to point out wherein their bill set forth facts that would entitle them to any equitable relief. The bill shows that a decree of some kind was entered in the Superior Court of Cook County in January, 1931, but it does not state in what particular it affects this proceeding."

The bill further states that on the 4th of February, 1931, the declaration of forfeiture of the contract was served upon appellants giving them until the 10th of March, 1931, to make the payments due upon the contract; that the forcible entry and detainer suit was started in a Justice of the Peace's Court; that on April 25, 1931, a

judgment in favor of Hildebrandt was entered for the possession of the property; that the Harrises perfected an appeal from that decision of the Circuit Court of DuPage County; that on the 4th of November, 1931, a judgment in favor of Hildebrandt was entered against the Harrises for the possession of the property; that an appeal was brought to this appellate court, but was dismissed; that the bill in the present case was filed on the 25th of January, 1932.

From the above statement of facts it will be noted that the appellants had a judgment for possession against them by the Police Magistrate who heard the forcible entry and detainer suit, and later by the Circuit Court of DuPage County.¹ If the appellants, at the time of filing their bill of complaint, had any grounds for equitable relief, they had those same grounds at the time of serving the notice of forfeiture, and at the time of starting the forcible entry and detainer suit.¹ The delay in filing their bill until nearly a year after the judgment of the Circuit Court, shows that the appellants have not used reasonable diligence in asserting their rights in this matter. From an examination of the bill of complaint this court is of the opinion that it does not state facts sufficient for a court of equity to enjoin the appellee from declaring a forfeiture of this contract and that the Chancellor properly sustained the demurrer to the bill.¹ The decree of the trial court should be, and is, hereby affirmed.¹

Judgment affirmed.¹

interest in favor of defendant was entered for the purpose of
 the property; that the services rendered in respect to the property
 of the district court of Orange County, and in the city of New York,
 1881, a payment in favor of defendant was entered in the
 records for the possession of the property; that on several occasions
 to the appellate court, and the defendant; that the bill in the year
 past was filed in the Court of Appeals, 1881.

From the above statement of facts it will be noted that the
 defendant had a judgment for possession against the plaintiff
 defendant who owned the property after the defendant's suit, and later
 by the District Court of Orange County. In the meantime, at the time
 of filing their bill of complaint, the defendant's bill of complaint
 they had those same grounds at the time of service for service of their
 return, and at the time of stating the grounds of their complaint
 suit. The bill in filing which will result in a new action for
 judgment of the District Court, from the defendant's bill of
 need reasonable diligence in asserting their rights in this matter.
 from an examination of the bill of complaint this court is of the
 opinion that it does not state a sufficient case for a writ of equity
 to enforce the judgment now rendered in the District Court of Orange
 and that the Chancellor properly sustained the defendant's bill.
 The decree of the trial court should be, and is, hereby affirmed.
 Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8572

12 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 607⁵

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 25 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

In the Matter of the Estate
of Carsten Nickelsen, Deceased,
(Henry Nickelsen,

appellant)

Appeal from Circuit Court

vs.

of Lake County

Union Bank of Chicago,

appellee,

Wolfe, P. J.

Carsten Nickelsen died on February 27, 1929 at Deerfield in Lake County, Illinois, leaving a Last Will and Testament, in which the Union Bank of Chicago was named executor. On April 22, 1929, the Union Bank of Chicago was appointed executor in said estate by the probate court of said county. The estate consisted entirely of personal property of the approximate value of \$66,000.00. Among the assets of the estate were two notes executed by A.G. Gates for the sum of \$1500.00 each, one dated on October 20, 1926, and the other on December 8, 1929.

Another item of the assets of said estate was a note secured by a first mortgage on real estate of Charles A. Pfingsten, dated April 29, 1925 and due on or before April 29, 1930. Said note was for the sum of \$45,000.00.

The Union Bank of Chicago, as executor of said estate, filed its petition in the Probate Court of Lake County, asking leave to bring foreclosure proceedings in Cook County on said \$45,000.00 note and mortgage. A hearing was had on said petition and an order entered by said probate court on May 26, 1930 granting leave to said executor to bring said foreclosure proceedings. A bill was filed in the Superior Court of Cook County on July 1, 1930 to foreclose said mortgage. A hearing was had and a decree of foreclosure entered on

In the Appellate Court of Illinois

Second District

October Term, A. D. 1932

In the Matter of the Estate

of Gustaf Mikaelson, Deceased,

(Henry Mikaelson,

Appellant)

Against First Trust Bank

of Lake County

vs.

Union Bank of Chicago,

Appellee,

Wolfe, P. J.

Gustaf Mikaelson died on February 27, 1929 at Deerfield in Lake County, Illinois, leaving a last will and testament, in which the Union Bank of Chicago was named executor. On April 22, 1929, the Union Bank of Chicago was appointed executor in said estate of the probate court of said county. The estate consisted entirely of personal property of the approximate value of \$62,000.00. Among the assets of the estate were two notes recorded for A. D. 1925 for the sum of \$1500.00 each, one dated on October 20, 1925, and the other on December 2, 1925.

Another item of the assets of said estate was a note secured by a first mortgage on real estate of Charles A. Mikaelson, dated April 22, 1925 and due on or before April 22, 1930. This note was for the sum of \$45,000.00.

The Union Bank of Chicago, as an executor of said estate, filed its petition in the Probate Court of Lake County, Illinois, for the foreclosure proceedings in 1930. In said petition, it was stated that the Union Bank of Chicago was the holder of the notes and mortgage. A hearing was had on said petition and an order entered by said probate court on May 10, 1930 granting leave to set aside to bring said foreclosure proceedings. A bill was filed in the Superior Court of Cook County on June 1, 1930 to foreclose said mortgage. A hearing was had and a decree of foreclosure entered on

November 15, 1930. Henry Nickelsen, one of the heirs of said Carsten Nickelsen, filed a bill in the Circuit Court of Lake County on July 31, 1929 to contest the validity of the will of Carsten Nickelsen, deceased. The case came on for a hearing on October 19, 1931 and a decree was entered in said case setting aside said will and the executor ordered to file a report of his doings and make final account.

The Union Bank of Chicago, as such executor, filed its report in the Probate Court of Lake County. Henry and Arthur Nickelsen, only heirs at law of Carsten Nickelsen, deceased, filed objections to said report. A hearing was had on the report and objections and the court entered judgment overruling all the objections, and approving each and every item of said account, except as to the item of fees and commissions of said executor, which fees and commissions of the executor were allowed in the sum of \$1200.00. The case was appealed to the circuit court and on a hearing in said court, a similar order was entered as in the probate court. The objectors, jointly and severally, prayed an appeal to the court. Henry Nickelsen only has perfected his appeal.

The appellants contend that the executor must account to the estate for the proceeds of the mortgage inventoried in the principal sum of \$45,000.00, together with interest and costs of foreclosure, amounting in all to \$51,768.50. This contention is based upon the fact that the receipt given by the Master in Chancery after the sale and signed by William G. Wise, solicitor for the executor in the foreclosure suit, recites that said sum was received by Mr. Wise. There is nothing in the record showing that the executor received any cash at all at the sale. The property was bid in at the sale at the full amount of the debt, interest and costs. The Master so reported to the court and this report was approved by the court. A certificate of purchase was issued by the Master to the Union Bank of Chicago as executor and complainant. The amended final account and report of the executor shows that it is in possession of such certificate, and that no cash was paid at the sale. The Master's report of sale, when filed,

November 1, 1930. Henry Nicholson, one of the heirs of said
Garsten Nicholson, filed a bill in the Circuit Court of Lake County
on July 31, 1930 to contest the validity of the will of said
Nicholson, deceased. The case came on for hearing on November 1,
1931 and a decree was entered in said case setting aside said will
and the executor ordered to file a report of his business and take
final account.

The Union Bank of Chicago, as such executor, filed its report
in the Probate Court of Lake County. Henry and Thomas Nicholson, only
heirs at law of Garsten Nicholson, deceased, filed objections to said
report. A hearing was had on the report and objections and the court
entered judgment overruling all the objections, and approving each
and every item of said account, except as to the item of fees and
commissions of said executor, which fees and commissions of the
executor were allowed in the sum of \$100,000. The case was appealed
to the circuit court and on a hearing in said court, a similar order
was entered as in the probate court. The objections, jointly and
severally, prayed an appeal to said court. Henry Nicholson only has
perfected his appeal.

The appellate contentions that the executor must account to the
estate for the proceeds of the mortgage investments in the principal
sum of \$5,000.00, together with interest and costs of investments,
amounting in all to \$51,758.50. This contention is based upon the
fact that the receipt given by the Master in Chicago after the sale
and signed by William C. Cook, solicitor for the executor in the for-
closure sale, recited that said sum was received by Mr. Cook. There
is nothing in the record showing that the executor received any part
at all of the sale. The property was sold to the wife of the said
amount of the debt, interest and costs. The Master or receiver for
the court and this fact was approved by the court. A declaration
of purchase was issued by the Master to the Union Bank of Chicago as
executor and complainant. The amended final account and report of the
executor shows that it is in accordance with said declaration, and that
no cash was paid at the sale. The Master's report of sale, when filed,

became a matter of record, and was available to the appellant and all objectors for inspection.

The appellant further contends that it was the duty of the Union Bank of Chicago as such executor to bid only the amount of \$30,000.00 for the property at the time of the sale, instead of bidding \$51,768.50, the amount of the mortgage, interest and costs. The appellants contend that the property is only worth \$30,000.00 and if the executor had bid that amount it would not have been sold to them at that price and they could have taken a deficiency judgment against the maker of the note for the balance of the indebtedness. The appellee contends that by paying the full amount of the indebtedness that they were acting for the best interest of the estate, for the reason the property is worth more than the amount of the bid, and if the defendant in the mortgage foreclosure suit wished to redeem the property he would have to pay the full amount of the indebtedness and that a deficiency judgment against him would have been of no value.

In the Superior Court of Cook County the Master in Chancery filed his report setting up the facts of the sale of the said property and the report was approved by the court. Whether the way suggested by the appellant would have been for the best interest of the estate, or whether the property was really sold and bid in by the executor was the best way, is speculative.¹ But the Judge of the Superior Court approved the method adopted by the executor, and, therefore, there is nothing in the record to show but that the executor acted in good faith, in bidding in the property at the price they did. The record further discloses that the attorneys for their respective parties discussed this matter before the sale and had knowledge of how the sale was to be made.

The brief and arguments of the appellant, charges bad faith, mis-conduct, dishonesty and suppression of facts as to the conduct of the executor in bringing the mortgage foreclosure suit. Before the executor proceeded to file a bill to foreclose the mortgage it applied to the Probate Court of Lake County for permission to do so.⁴ Certainly this was the proper place for the executor to go for

because a matter of record, and was available to the public and the
inspectors for inspection.

The appellant further contends that it was the duty of the
Union Bank of Chicago as such executor to bid only the amount of
\$30,000.00 for the property at the time of the sale, instead of \$40,000.00.
\$51,788.50, the amount of the mortgage, interest and costs. The
appellant contends that the property is only worth \$30,000.00 and that
the executor had bid that amount it would not have been sold to them
at that price and they could have taken a deficiency judgment against
the maker of the note for the balance of the indebtedness. The appellee
contends that by paying the full amount of the indebtedness that they
were acting for the best interest of the estate, for the reason the
property is worth more than the amount of the bid, and if the defendant
in the mortgage foreclosure suit wished to redeem the property he
would have to pay the full amount of the indebtedness and that a
deficiency judgment against him would have been of no value.
In the Superior Court of Cook County the master in Chancery
filed his report setting up the facts of the sale of the said property
and the result was approved by the court. Whether the sale was approved
by the appellant would have been for the best interest of the estate,
or whether the property was fairly sold and bid in by the executor and
the best was, is speculative. But the judge of the Superior Court
approved the action adopted by the executor, and, therefore, there is
nothing in the record to show that the executor acted in error.
Failing in finding in the property at the price they bid. The record
further discloses that the attorney for said respective parties
discovered the matter before the sale and the knowledge of the sale
was to be made.
The trial and judgment of the appellant, master and judge,
the executor, disinterested and dispassionate at that as to the amount
of the executor in liquidating the mortgage foreclosure suit. Where
the executor proceeded to bid a bill to foreclose the mortgage it
applied to the Probate Court of Lake County for permission to do so.
Certainly this was the proper place for the executor to go for

directions on how to proceed in the matter. A hearing was had upon the petition, and the Probate Court directed the executor to proceed with the foreclosure suit. Unless otherwise shown, the court would assume that the probate court, in passing upon the petition, had all the facts presented to them and the order was entered in good faith. After an examination of the records in this case we have come to the conclusion that there is no evidence of bad faith, fraud, or mis-conduct on the part of the executor in bringing the foreclosure suit.

In the discussion of the matter of fees between the trial court and the attorney for the objectors in the circuit court, Mr. Haase, attorney for the objectors said: "We do not object as to the reasonableness of those items, but we say here that there should not have been anything spent for that; get the distinction I am trying to make. In other words, we claim there should not have been any foreclosure. If your honor finds there should have been a foreclosure, these amounts are not unreasonable." From the foregoing it is plain that the appellants did not object to the reasonableness of any of the fees but admitted that if the foreclosure proceeding was proper, then the fees allowed by the court were reasonable.

It is our opinion that the foreclosure proceedings were properly brought; that the executor was wholly within his rights in bidding in the property for the amount of the indebtedness and costs, and that the fees allowed by the Circuit Court were proper. The judgment of the Circuit Court of Lake County should be, and is, hereby affirmed.

AFFIRMED.

direction as how to proceed in the matter. A hearing was had upon the petition, and the Probate Court directed the executor to proceed with the foreclosure suit. These matters show, the court would assume that the Probate Court, in passing upon the petition, had all the facts presented to them and the order was entered in said matter. After an examination of the records in this case we have come to the conclusion that there is no evidence of such facts, facts or the conclusion on the part of the executor in bringing the foreclosure suit.

In the discussion of the matter of fees between the legal parties and the attorney for the objectors in the circuit court, Mr. Wren, attorney for the objectors said: "As to not object as to the payment of these fees, but we say here that there should not have been anything spent for that; yet the distinction I am trying to make. In other words, we claim there should not have been any foreclosure. If your honor finds there should have been a foreclosure, these amounts are not unreasonable." From the foregoing it is plain that the applicant did not object to the reasonableness of any of the fees but admitted that if the foreclosure proceeding was proper, then the fees allowed by the court were reasonable.

It is our opinion that the foreclosure proceedings were properly brought; that the executor was dealing with the estate in bidding in the property for the amount of the indebtedness and costs, and that the fees allowed by the Probate Court were proper. The judgment of the Circuit Court of Lake County should be affirmed.

AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8597

AT A TERM OF THE APPELLATE COURT,

H

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

271 I.A. 608¹

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

George A. Amacker and
Harriet M. Amacker, (Plaintiffs)
Appellees,

vs.

Appeal from the Circuit
Court of DuPage County.

Ferdinand J. Karasek and
Marjorie L. Karasek, (Defendants)
Appellants.

WOLFE--P.J.

George A. Amacker and Harriet M. Amacker started suit before a justice of the peace in DuPage County against Ferdinand J. Karasek and Marjorie L. Karasek to recover possession of certain property. The case was tried before the justice of the peace, and an appeal prayed and perfected to the Circuit Court of DuPage County, where it was tried before a jury. The jury found the plaintiff to be entitled to possession of the premises. Motions for a new trial and arrest of judgment were overruled. An appeal was perfected to this court.

In the fall of 1927 the defendants entered into a written contract with the plaintiffs to purchase the property in question for the sum of \$16,750.00, on which \$4000.00 was paid in cash on the purchase price. On August 1, 1930, new articles of agreement were entered into by the plaintiffs as vendors and the defendants as vendees. This second contract or agreement covered the same premises as described in the first contract and agreement. This second agreement, among other things, specified that the defendants were to pay \$12,090.98 for the premises with interest on said sum at the rate of six per cent per annum in the manner following: \$325.00 cash on account of said principal debt at the time of the execution of the agreement; and the further sum of \$125.00 per month on the first day of each and every month thereafter to and including the 1st day of February, 1931.

IN THE
COURT OF COMMONS
OF THE DISTRICT OF COLUMBIA

Filed for Record, A.D. 1921.

George A. Harbo, Plaintiff,
vs.
Harriet M. Harbo, (Defendant),
and
James M. Harbo, (Defendant).

Filed for Record, A.D. 1921.
Court of District of Columbia.

Harriet M. Harbo, Plaintiff,
vs.
James M. Harbo, (Defendant),
and
George A. Harbo, (Defendant).

Vol. 100-100.

George A. Harbo and Harriet M. Harbo, Plaintiffs, and James M. Harbo, Defendant, of the District of Columbia, do hereby certify that the following is a true and correct copy of the original of the same as the same was filed before the District Court of the District of Columbia, and as the same was filed before a jury. The jury found the plaintiff to be entitled to possession of the premises. Motion for a new trial and arrest of judgment were overruled. No appeal was perfected in this case.

In the fall of 1920 the defendant entered into a written contract with the plaintiff to purchase the property in question for the sum of \$16,750.00, on which \$400.00 was paid in cash on the purchase price. On August 1, 1920, two articles of agreement were entered into by the plaintiff as vendor and the defendant as vendee. The second contract or agreement covered the same premises as mentioned in the first contract and agreement. The second agreement, among other things, specified that the defendant was to pay \$10.00 per month for the premises with interest on said sum at the rate of six per cent per annum in the manner following: \$10.00 cash in payment of said principal and at the time of the expiration of the agreement; and the further sum of \$10.00 per month on the first day of each and every month hereafter to and including the last day of February, 1921.

The first of said monthly payments was to be made on the 1st day of September, 1930.' The said monthly payments were to be applied first, to the payment of the interest at the rate of six per cent per annum on the entire balance due of the purchase price from time to time outstanding and unpaid. On the 1st day of February, 1931, the vendees were to pay the entire balance of said purchase price then remaining unpaid. Any payments due and not paid were to draw interest at the rate of seven per cent after maturity.'

By this agreement the plaintiffs agreed to convey the premises in question to the defendants, subject, however, to the taxes and assessments after the year 1926, and unpaid installments on special assessments falling due after 1926.' The agreement further provided that the time of payment should be of the essence of the contract.

It is contended by the appellants that the appellees cannot now insist on a strict compliance with the contract for the reason that they, as vendors, had waived their right to demand payments due, and before they could declare a forfeiture they should have given the appellants written notice of their demand for a strict compliance with the contract. We are of the opinion that the evidence does not show that the appellees had waived their right to demand a strict compliance with this contract; but, even though they had, it would not affect the rights of the appellees to this litigation, as the evidence shows that the entire amount was past due before the time the suit was started and demand had been made for the possession of the property.' A waiver of the time element in payment and the strict performance of the same as to one of the provisions of the contract is not necessarily a waiver of all of the contract's time specifications. Boardman vs. Bubert, 325 Ill. 38.'

It is next contended by the appellants that it was necessary for the appellees, before they could declare a forfeiture of the contract, to present to the appellants a deed for the premises and demand payment of the balance of the purchase price that was due at that time. No doubt that under some circumstances this is a correct rule of law, but the cases cited by appellants as sustaining this contention are not cases that arose under such circumstances as

[illegible]

in question is the relationship between the two groups, and the question is whether the two groups are the same or different. The answer is that the two groups are the same, and the relationship between them is that of a whole and its parts.

[illegible][illegible]

are found in this case. The appellants had paid little or nothing under the contract and were in default several months after the entire purchase price had become due. A written demand for the premises was made on Ferdinand J. Amacker on May 5, 1931, and on Marjorie L. Amacker on May 29, 1931. The suit was not started until June 11, 1931. The contract was past due from February 1, 1931. We are of the opinion that the appellees have proven that they were entitled to the premises in question at the time the suit was started before the justice of the peace.

The appellants urge that the instructions given on the part of the plaintiff at the trial court were erroneous. We have examined the instructions in relation to the facts in the case and we are not prepared to say that any reversible error was committed in the giving of these instructions. The first instruction did not mention any necessary facts, nor did it assume any material facts, nor does it direct a verdict. They complain of the second and third instructions because it is said they assume certain facts to exist. It is a well known rule of law that instructions may assume admitted facts about which there is no controversy. The facts assumed to be true in these instructions are not disputed as being true. The objections to the second and third instructions are not well founded. It is claimed that the sixth instruction is bad because it informs the jury to the effect that the only question to be decided by them was the right of possession of the premises. We think this is the only question involved in this suit: Is the plaintiff entitled, or was the plaintiff entitled to the possession of the premises at the time of the trial. We, therefore, conclude, that the instruction is not bad. From an examination of the whole record it is our opinion that there was no reversible error committed in the trial of the case. The judgment of the Circuit Court of DuPage County should be, and is, hereby affirmed.

Judgment Affirmed.

are found in this case. The applicant had been in contact with the writer
under the contract and was in default several times. The writer
checked price and found that it was higher than the contract price.
made an agreement. Applicant on May 11, 1951, was in default. Applicant
on May 11, 1951. The applicant was in default until June 11, 1951. The
contract was made on June 11, 1951. The applicant was in default
and the applicant has shown that they were entitled to the contract
in question at the time the contract was made. The applicant

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8612

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 608²

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

Charlotte Osborn, Administratrix
of the Estate of Roy Osborn,
Deceased,

Plaintiff in error,

vs.

Error to Circuit Court of
Livingston County.

Homer L. Parkhill,

Defendant in error.

WOLFE--P.J.

Charlotte Osborn as administratrix of the estate of Roy Osborn, deceased, started suit in the Circuit Court of Livingston County against Homer L. Parkhill, alleging that through the negligent operation, the defendant, while driving his automobile cause the death of plaintiff's intestate. A jury tried the issue which resulted in a verdict finding the defendant "not guilty." After overruling plaintiff's motion for a new trial the court entered judgment on the verdict in favor of the defendant and against the plaintiff for costs of suit. From this judgment Charlotte Osborn as such administratrix brings the case to this court on a writ of error.

The declaration consists of four counts. Each count of the declaration avers that the plaintiff's intestate was, at all times, in the exercise of ordinary care for his own safety and that the injury complained of was occasioned as the result of the negligence of the defendant.

This case was before this court on a former occasion, and is reported in 263 Ill. App. 662. In the former opinion a full statement of the facts will be found and for that reason we deem it unnecessary to make a statement of facts in this case.

In the former hearing of this case several instructions were held to have been bad. We also found that the verdict was manifestly

IN THE
APPELLATE COURT OF INDIANA
SECOND DISTRICT

February Term, A.D. 1933.

Charlotte Gabor, Plaintiff,
vs.
The State of Indiana, Defendant.

Appeal from Circuit Court of
Madison County.

James D. Perkins,
Counsel for Defendant.

WITNESSES:

Circuit Court of Madison County, the State of Indiana, deceased, started suit in the Circuit Court of Madison County against James D. Perkins, Plaintiff, for the death of Plaintiff's husband, while driving his automobile cause the death of Plaintiff's intestate. A jury found the issue which resulted in a verdict finding the defendant "not guilty". After overruling Plaintiff's motion for a new trial the court entered judgment on the verdict in favor of the defendant and against the plaintiff for costs of suit. From this judgment Charlotte Gabor as next administratrix of the estate of her husband brought a writ of error.

The exception consists of four counts. Each count of the exception avers that the plaintiff's husband, at all times, in the exercise of ordinary care for his own safety and for the safety of the community of was concerned as the result of the negligence of the defendant.

This case was before this court on a former docket, and is reported in 237 Ill. App. 2d. In the former opinion a full statement of the facts will be found and the facts herein are not necessary to set a statement of facts in this case.

In the former opinion in this case several instructions were held to have been held. It was found that the verdict was manifestly

against the weight of the evidence. In this record it appears that the errors complained of in the instructions have been corrected. We have examined this record and it appears to us that the evidence at the last trial, being the case which is now before us, is substantially the same as the evidence was on the former trial.

The plaintiff in error contends that the trial court erred in admitting the evidence of the witness Orville Johnson. He testified that the car in which the deceased was riding was being driven at an unreasonable rate of speed, at a point about two and half miles from the place where the accident occurred. While this evidence is remote, we think it was not error for the court to admit it. It should be considered by the jury and they should take into consideration in weighing it, how far the car was away from the scene of the accident at the time the witness testified to.

The plaintiff in error also complains that her instructions, numbers 3 and 8, should have been given as they relate to the care which the deceased Osborn should have exercised at the time and just prior to the collision that caused his death. We cannot say that the giving of the 3rd instruction on that subject would be reversible error. The giving of that many instructions on the same subject has been criticised by our courts as giving undue emphasis to that feature of the case. Defendant's given instruction No. 5, we do not think is subject to the criticism directed to it by the plaintiff in error.

In our former opinion this court held that the verdict of the jury was manifestly against the weight of the evidence and from an examination of the record in this case we are of the opinion that this verdict is manifestly against the weight of the evidence, and for this reason the judgment of the Circuit Court of Livingston County should be and is hereby reversed and the case remanded for a new trial.

Reversed and remanded.

against the weight of the evidence. In this regard it must be noted that the errors complained of in the instructions have been corrected. It has explained this point and it appears to me that the evidence of the last trial, being the only one in the case, is not sufficient to show that the evidence was in the former trial.

The difficulty is much greater than that which would arise in admitting the evidence of the witness (David) because, as stated, that the law is which the defendant was riding was taken from an innumerable set of cases, at a point about two and half miles from the place where the accident occurred. While this evidence is correct, we think it was not given for the purpose of which it is now being considered by the jury and that it is not relevant to the question of liability. It is not relevant to the question of liability at the time the witness testified to.

The difficulty is even greater than that which would arise in admitting the evidence of the witness (David) because, as stated, that the law is which the defendant was riding was taken from an innumerable set of cases, at a point about two and half miles from the place where the accident occurred. While this evidence is correct, we think it was not given for the purpose of which it is now being considered by the jury and that it is not relevant to the question of liability. It is not relevant to the question of liability at the time the witness testified to.

The difficulty is even greater than that which would arise in admitting the evidence of the witness (David) because, as stated, that the law is which the defendant was riding was taken from an innumerable set of cases, at a point about two and half miles from the place where the accident occurred. While this evidence is correct, we think it was not given for the purpose of which it is now being considered by the jury and that it is not relevant to the question of liability. It is not relevant to the question of liability at the time the witness testified to.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8614

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED C. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 608³

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

WILLIAM H. WRIGNEY,

Appellant,

Appeal from Circuit Court,
Peoria County, Illinois.

vs.

FRANK W. LICHTWEISS,

Appellee.

WOLFE--P.J.

William H. Wrigney, the appellant, brought suit against Frank W. Lichtweiss, the sheriff of Peoria County, in the Circuit Court of said county. The suit was for the statutory penalty provided for an officer levying upon and selling exempted property. The General Motors Acceptance Corporation obtained a judgment against the appellant for the sum of \$384.06. Execution was issued and delivered to the sheriff, which was served by the sheriff through one of his deputies. At the time the execution was served the sheriff notified the appellant that if he wished to claim his exemption he should file a schedule of his personal property. On the same day, or the next day after, the appellant filed a schedule of his personal property with the sheriff. He scheduled, among other things listed 1 Viking 8 Automobile. The sheriff did not appoint any appraisers to appraise the scheduled property, but sold the Viking Automobile at public sale for the sum of \$100.00. This amount he credited on the execution and returned the same partly satisfied. The sheriff knew that the appellant had filed his schedule and that the automobile in question was listed in that schedule.

The appellant filed a suit against the sheriff claiming the statutory liability, or penalty, for twice the value of the car that was sold. The declaration consists of four counts. The appellee filed the plea of the general issue with notice of special defenses,

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DIVISION

February Term, A.D. 1933.

WILLIAM W. WILSON,

Appellant,

Against The People of the State of Illinois,
Respondent.

vs.

FRANK W. WILSON,

Appellee.

FOURTH-201.

WILLIAM W. WILSON, the appellant, was arrested with warrant from

J. H. HICKMAN, the sheriff of Boone County, in the Circuit Court

of said county. The writ was for the attachment penalty provided for

an officer levying upon and selling exempted property. The General

Motors Assurance Corporation obtained a judgment against the appel-

lant for the sum of \$384.08. Execution was issued and delivered to

the sheriff, which was served by the sheriff through one of his

deputies. At the time the execution was served the sheriff notified

the appellant that if he wished to claim the exemption he should file

a schedule of his personal property. On the same day, or the next day

after, the appellant filed a schedule of his personal property with

the sheriff. He scheduled, among other things listed in items 8

and 9 thereof. The sheriff did not receive any return from the

the scheduled property, but sold the 1932 automobile as public

sale for the sum of \$100.00. This amount he credited on the execution

and returned the same partly satisfied. The sheriff knew that the

appellant had filed the schedule and that the automobile is exempt

was listed in that schedule.

The appellant filed a bill of costs and the sheriff claimed the

statutory liability, or penalty, for twice the value of the car sold

was sold. The declaration demands of your court. The appellant

filed the plea of the general issue with notice of appeal. He

which were: the question of ownership of the automobile; that the automobile was worth more than the statutory exemption to which the appellant was entitled, and that appellant had waived his rights, if any, in the cause of action brought. The appellant charges in each count of the declaration that the value of the automobile was between \$1500.00 and \$2000.00. He testified on the trial of the case that, in his judgment the reasonable price of the automobile was \$1285.00. At the close of the evidence the defendant filed a motion to have the court instruct the jury to find the defendant not guilty; this motion was allowed and the instruction given. The jury brought in their verdict according to said instruction. Motion in arrest of judgment was overruled. Judgment entered for the defendant, and an appeal to this court was granted.

Section 14, Chapter 52 of Smith-Hurds Statutes of Illinois, provides: that after execution has been served and the debtor has filed a schedule with the sheriff, the sheriff shall summon three householders, who after being duly sworn to fairly and impartially appraise the property of the debtor, shall fix a fair valuation upon each of the articles contained in said schedule, and the debtor shall then have the right to select from such schedule the articles he or she may desire to retain, the aggregate value of which shall not exceed the amount exempted.

Section 17 of said chapter provides; "If any officer by virtue of any execution or other process, or any other person by any writ of distress shall take or seize any of the articles of property exempted as herein provided, for the levy and sale of it, such officer or person shall be liable to the party injured for double the value of the property so illegally taken or seized to be recovered by an action of trespass with costs of suit." The record in this case clearly discloses that at the time the execution was served upon the appellant, the deputy sheriff notified him of his right to file such schedule. That the appellant did file such a schedule giving a list of personal property among which was the automobile in question. That the sheriff did not appoint any appraisers to fix the value of the property scheduled,

[illegible]

but proceeded to sell the same, or the part that he desired to sell, viz., the automobile. That he sold the same for \$100.00 and he gave the appellant credit for that amount of the execution.'

We are of the opinion that the appellant under the evidence as disclosed by this record made out a prima facie case against the sheriff and the court erred in directing a verdict for the defendant.'

Section 13, of said Chapter 52 of the Statute provides: "That the following personal property, owned by the debtor shall be exempt from execution, writ of attachment and distress for rent, viz: First: The necessary wearing apparel, bible, school-books, and family pictures of every person; and Second: One hundred dollars worth of property, to be selected by the debtor, and in addition, when the debtor is the head of a family and resides with the same, three hundred dollars worth of other property, to be selected by the debtor, etc."

Undoubtedly the appellant in this case was entitled to \$400.00 worth of property that was exempt from execution. This Court has no knowledge of what any of the property scheduled was worth, aside from the price the sheriff sold the automobile for and the value placed upon it by the appellant. The appellees have cited the cases of Cook vs. Scott 1 Gilman, 333; and Waldo vs. Gray, 14 Ill. 184., as sustaining their contention that where an article is worth more than the amount of the debtors' exemption and that he had other property, then the officer would not be liable for damages for having proceeded to sell the property.' It will be noted in each of these cases that the officer sold the property for a great deal more than the debtor's exemption, but in the case at bar it will be noted that the automobile was sold for \$100.00, and there is no evidence whatsoever of the value of the other scheduled property.'

The judgment of the Circuit Court of Peoria County is hereby reversed and the case remanded to said court for a new trial.'

Reversed and remanded.'

but presented to sell the land, or the land to be sold to the
vix., the mortgagee. That he sold the land to the mortgagee
the mortgagee credit for that amount on the mortgage.

He was of the opinion that the mortgagee credit for the amount of
the mortgage credit was a credit on the mortgagee credit.

Section 12, of said Chapter 22 of the Statute provided: "If at
the following mortgagee property, owned by the mortgagee, be exempt
from execution, with or without the mortgagee's consent, then the
The necessary wearing apparel, tools, school-books, and family articles
of every person; and

Second: One hundred dollars worth of property, to be selected by the
debtor, and in addition, when the debtor is the head of a family and
resides with the wife, three hundred dollars worth of other property,
to be selected by the debtor, etc."

Indubitably the mortgagee in this case was entitled to \$100.00
worth of property that was exempt from execution. The Court was
not acquainted with any of the property described in the statute, and
from the case the statute with the mortgagee's consent, and the
placed upon it by the mortgagee. The mortgagee's consent to the
of Cook vs. Cook, 1 Allen, 277; and also vs. Cook, 14 Allen, 104, is
sustaining their contention that there is no statute in this State
the amount of the debtor's exemption and that he may select property
then the officer would not be liable for damages for wrongfully
to sell the property. It will be noted in each of these cases that the
officer with the property for a great deal more than the mortgagee
exemption, and in the same way it will be noted that the mortgagee
and sold for \$100.00, and there is no evidence whatever of the value
of the other selected property.

The amount of the debtor's exemption is \$100.00.
reversed and the case remanded to sell land for a new trial.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8617

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED C. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 608⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

A W. BUTTERFIELD (Plaintiff)
Appellee,

vs.

Appeal from the Circuit
Court of Whiteside County,
Illinois.

AUGUST H. MEINS, WILLIAM C. McCUE,
THOMAS REGAN, G.M. Cassens,
Cornelius Habben, William Kraft, and
Walter Stern, co-partners doing business
under the firm name and style of August
H. Meins and Company, (Defendants)
Appellants.

WOLFE--P.J.¹

This case comes to this court from the Circuit Court of Whiteside County on appeal. Prior to December 24, 1925, A.W. Butterfield, the appellee, owned a farm of 91 acres in Whiteside County. The farm was near a railroad station, where a grain elevator owned and operated by appellants, was located. At this time the appellee was indebted to the First National Bank of Rock Falls on a note for \$4000.00 and the bank had requested this note to be paid. Appellee secured the money from his brother-in-law, George J. Hermes, and this note was paid. Butterfield then deeded the 91 acre farm to Hermes, but Butterfield continued to reside on the farm. The family resided on the farm continuously, but a great deal of the time Butterfield was away working on the railroad. Some times Hermes looked after the land and at other times appellee Butterfield looked after it. The appellee rented the farm to one Harley Cassens for one year from March 1, 1930 to March 1, 1931. The lease was for grain rent, each to receive one-half of the crops. The appellee lived in the house on the farm but the farm itself was leased at all times and operated by tenants.¹

Prior to 1931 the appellee had collected the proceeds from the sale of the crops and took the checks or money realized therefrom to

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1931.

A. W. HOFFMANN (Plaintiff)
vs.
J. J. WOLFE (Defendant)

vs.

ARTHUR H. HOFFMANN, WILLIAM C. HOFFMANN,
THOMAS HOFFMANN, G. W. HOFFMANN,
JENNIFER HOFFMANN, J. J. HOFFMANN, and
Walter HOFFMANN, co-partners doing business
under the firm name and style of HOFFMANN
(Defendants)

WOLFE--P. 1.

This case comes to this court from the Circuit Court of White-
side County on appeal. Prior to December 24, 1928, A. W. Hoffmann, the appel-
lee, owned a farm of 80 acres in Whiteside County. The farm
was near a railroad station, where a grain elevator owned and operat-
ed by appellee, was located. At this time the appellee was about
ed to the first National Bank of White Side, Illinois, and
and the bank had requested him to be paid. Appellee secured
the money from his brother-in-law, George A. Hoffmann, and this money
was paid. Appellee had received the money from his brother, but
but appellee continued to reside on the farm. The family resided in
the town continuously, but a great deal of the time appellee was
away working on the railroad. Some times he was located near the
farm and at other times appellee was located at other places. The
appellee rented the farm to his brother, George A. Hoffmann, from the first of
March 1, 1929 to March 1, 1931. The lease was for three years, and
to receive one-half of the crops. The appellee lived in the house
on the farm but the farm itself was leased to his brother and operated
by appellee.

When in 1931 the appellee had collected the money from the
sale of the crops and from the check of money collected from the

Appellant from the crops
of Whiteside County,
Illinois.

Hermes, who in turn went to the First Trust and Savings Bank of Sterling and paid the interest on the mortgage. Prior to the fall of 1930, Hermes helped fix the corn-crib and put it in condition to receive the year's crop. In the fall of 1930 he went to the elevator of the appellants and purchased lumber, and assisted by the tenant laid a new floor in the crib and the corn was put into the crib. In February, 1931, pursuant to directions from the appellee by letter, the landlord's share of the corn was delivered to the elevator and sold. In this letter the appellee told the elevator people when they got the returns from the corn they should take out their account, make out a check for the balance and leave it at his house, or give it to one of the boys. When the corn was sold and delivered, Hermes went to the elevator and talked to the manager of appellants about the check for the corn. Appellants knew that Hermes had a deed to the farm and also knew that Hermes had purchased lumber to fix up the crib on the farm. Hermes asked appellants to pay him the corn money, stating he had to pay the interest on the mortgage out of it. The amount due the appellee after deducting the bill he owed the appellant and for lumber purchased by Hermes was \$459.46. Hermes said that he needed \$550.00 to pay the interest. The appellant gave him the \$550.00 and carried the balance \$90.54 over the amount due the landlord for the corn. Appellant gave Hermes a check for this amount on February 21, and on March 20, Hermes went to the bank and paid \$550.00 interest, and also paid out of his own pocket over \$100.00 for taxes on the farm.

Shortly after March 20, appellee called at the elevator for the money and he was told that the appellants had paid all the money to Hermes and that he was to pay the interest on the mortgage. At this time the appellee said that it was all right for Hermes to have gotten the money if he had used it to pay the interest. There seems to be no doubt that Hermes paid the interest and in addition thereto about \$100.00 more for taxes on this land. About a year afterwards the appellee brought his suit against the appellants for the money, for \$459.46 principal and interest at 6 per cent from February 9, 1931,

...and in 1930, when the first year of the ...
...and the ... on the ...
...of 1930, ... helped ...
...to ... the ...
...of the ... and ...
...a ... in the ... and the ...
...February, 1931, ...
...the ...'s ... of the ...
...sold. In this ...
...they ... the ...
...made out a ...
...it to one of the ...
...went to the ...
...the ... for the ...
...the ... and ...
...origin on the ...
...estate ... the ...
...amount ... the ...
...and for ...
...needed \$25,000 to pay the ...
...and ... the ...
...the ...
...of ...
...est, and also paid out of the ...
...the ...
...Shortly after March 10, ...
...and he was ...
...Raines ...
...time the ...
...for the ...
...to be ...
...about \$100,000 ...
...the ...
...for \$25,000 ...

the time at which the corn was sold, making a total of the demand for \$497.73.'

At the close of all of the evidence introduced on the trial of the case the appellee asked the court to instruct the jury to find the issues for him, which the court did, and the jury found for the appellee in the sum of \$497.73. From this judgment the defendant prayed for and perfected an appeal to this court. Defendants have assigned as error that the court erred in instructing the jury to find for the plaintiff and allowing interest at the rate of six per cent.'

If any interest at all should have been allowed on this claim, we think that Sec. 2, Ch. 74, Cahill's Revised Statutes of 1931, is applicable and the rate of interest should have been five per cent instead of six per cent. The court does not express any opinion whether, under the evidence in this case, interest should have been allowed. We are of the opinion that the question of whether Hermes, under all of the circumstances and the dealings between the parties for years, was not authorized to collect this money and make the application which he did, was a question of fact that should have been submitted to the jury.' It is also a question of fact for the jury to decide whether the appellants were not lead to believe by the conduct of all the parties interested that the appellant should deliver this corn money to Hermes.' For this error of the court in not submitting the questions to the jury it is our opinion the case should be reversed and remanded to the Circuit Court of Whiteside County for a new trial.'

Reversed and remanded.'

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8628

AT A TERM OF THE APPELLATE COURT,

17A

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

271 I.A. 609¹

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 25 1933

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

The Swords Company,
a Corporation,
Appellant,

vs.

Appeal from Circuit Court,
Winnebago County.

Rockford Fibre Container Co.,
a Corporation,
Appellee.

WOLFE--P.J.

The appellant, the Swords Company, a corporation, started suit against the appellee, the Rockford Fibre Container Co., also a corporation, in the Circuit Court of Winnebago County. The declaration consists of the common counts with an affidavit of claim attached, and a bill of particulars. The pleadings of appellee were the general issue and an affidavit of merits. The only question in issue in the trial of the case is whether or not the appellee owed the appellant the amount of \$3,252.95 for work, labor, and material furnished pursuant to the first item in the appellant's bill of particulars. Trial by jury was waived by stipulation of both parties. The court heard the case and at the close of all of the evidence found the issues for appellee and entered judgment thereon, to which appellant excepted and prayed an appeal to this Court.

In the spring of 1928 the Rockford Power Machinery Co., through H.K. Hutton, its president and manager, entered into a contract with the appellee, for the complete installation, by the said Rockford Power Machinery Co. on the premises of appellee, of a 1,000 kilowatt turbine engine with condenser and its auxiliaries and a 100 kilowatt turbo generator set. The contract was that the Rockford Power Machinery Co. would purchase and install the said machinery for a

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
February 22, 1933.

The Lewis Company,
a corporation,
Appellant,

vs.

Edward E. Lewis, Jr.,
Respondent.

Rockford E. Lewis, Jr.,
a corporation,
Appellee.

Writ of Habeas Corpus.

The appellant, the Lewis Company, a corporation, moved and
against the appellee, the Rockford E. Lewis, Jr., a
corporation, in the District Court of the District of Columbia,
petition consists of the common counts with an exhibit of claim
attached, and a bill of particulars. The findings of fact
were the general issue and an affidavit of denial. The only question
in issue in the trial of the case is whether or not the appellee
owed the appellant the amount of \$1,000.00 for work, labor, and
materials furnished pursuant to the terms of the contract
bill of particulars. Trial by jury was waived by stipulation of
both parties. The court found the case and set aside all of
the evidence found the issues for appellee and entered judgment
thereon, to which appellant excepted and prayed an appeal to this
Court.

In the spring of 1928 the Rockford E. Lewis, Jr., corporation,
its president and manager, entered into a contract with
the appellee, for the complete installation, by way and means
Power Machinery Co. in the premises of appellee, of a 1,000
horsepower engine with condenser and its auxiliaries and a 250
horsepower generator set. The contract was made with Rockford E.
Lewis, Jr., would purchase and install the same in the premises.

total sum of \$24,000.00. For some reason the Rockford Power Machinery Co. did not want to advertise in its own name for the said machinery to be purchased and installed and instructed the appellee to do so for the appellant.

Exhibit six is a confirmation of the verbal order and contract between the Rockford Power Machine Co. and the appellee, the consideration of which both parties admit to be correct. It is not disputed that the turbine engine, condensers, etc., were installed in the plant of the appellee. After the turbine engine was installed in said plant the record discloses that the appellee company was not satisfied with the way it operated and the matter was discussed both orally and in writing between the parties. After the engine had been in use for several months it was repaired by the Rockford Power Machine Company. The value of the material used and labor employed in making these repairs is the subject matter of this suit. The account was assigned to the Swords Company.

It is the contention of the appellant that exhibit six is a complete written contract and embodies the whole transaction, consequently it cannot be varied or explained by parol testimony. The appellee contends that the exhibit itself shows on its face that it is merely a confirmation of a verbal contract and does not embody warranties that were made relative to the engine in question. They further contend that under such circumstances it is competent and proper to admit parol testimony to prove the warranties made by the appellant to the appellee prior to the installation of the engine. The appellant admits this to be the general rule, but denies that the same is applicable to this case as they contend the contract in question as set forth in exhibit six is not subject to explanation, but is complete within itself.

This same question was before this court in the case of Morris Offenbergs vs. Arrow Distilleries Co., 222 Ill. App. 512 in which we state, "But it is insisted that the evidence which was offered for the purpose of showing an oral warranty was inadmissible and therefore it should not have been considered by the trial court because the

total sum of \$2,000.00. For some reason the plaintiff's attorney
did not want to advertise in the New York Times and
he purchased and installed and installed the machine in the
the apartment.

Exhibit A is a continuation of the verbal conversation between
between the plaintiff and the defendant, the defendant
admits on which both parties admit to be correct. It is not disputed
that the machine was, in fact, installed in the apartment
of the plaintiff. After the machine was installed in the apartment
the record discloses that the plaintiff company was not satisfied with
the way it operated and the machine was returned to the plaintiff
writing between the parties. After the machine was returned to the
several copies it was received by the plaintiff company. Several
The value of the material used and labor expended in making them
remains in the subject matter of this suit. The record was not
in the plaintiff company.

It is the contention of the plaintiff that Exhibit A is a
complete written contract and embodies the entire transaction, and
accordingly it cannot be varied or explained by oral testimony. The
plaintiff contends that the exhibit itself shows in its face that it
is a contract of a valid contract and does not contain
variations that would make it void or voidable. The
further contend that under their circumstances it is a contract and
proper to admit oral testimony to prove the variations made by the
plaintiff to the typewritten contract in the original.
The plaintiff admits it is to be the general rule, but only that
the same is applicable to this case as to the contract in
question as not being in Exhibit A is not subject to explanation,
but is complete within itself.

This same question was before the court in the case of
O'Brien v. New York Telephone Co., 122 N.Y. 2d 1000, 1001 N.Y.S.2d 1000,
1001 N.E.2d 1000, 1001 N.Y.S.2d 1000, 1001 N.E.2d 1000,
the purpose of showing that the plaintiff was not satisfied with the
time it should not have been considered by the court as a contract.

effect of the admission of such evidence would be to vary the terms of the so-called written contract between the parties. This rule might be applicable in this case if the written order for the goods purported to express the entire agreement between the parties, but if it does not purport to express the entire agreement between the parties, then the rule against admission of parol evidence cannot be applied."

"There is much authority to the effect that such an instrument as the one above set forth is not such a formal contract as will merge all previous oral agreements or warranties between the parties and exclude oral testimony, tending to establish a collateral agreement not included in the order signed by one party and accepted by the other. *Leavitt vs. Fiberload Co.*, 196 Mass. 440; *Harri's vs. Marsh*, 217 Fed. 555. Evidence of a parol contemporaneous agreement connected with a sale of personalty is admissible, although the sale is evidenced by a written instrument, provided such agreement does not tend to vary or contradict the terms of the writing itself. And it is proper to admit evidence to show that there was an oral warranty with respect to the articles sold. 22 Corpus Juris, p. 1257, sec. 1677."

From an examination of the exhibits and testimony in this case, we are of the opinion that exhibit six does not fully state the contract between the parties but was subject to explanation by oral testimony, and the court did not err in hearing such testimony. The court found from the testimony given in the case that there was a warranty of the machine in question, to work satisfactorily and that the machine did not measure up to the standard as warranted by the appellant. From an examination of the whole record in the case this court is not prepared to say that such finding is manifestly against the weight of the evidence and the judgment of the Circuit Court of Winnebago County should be, and is, hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 609²

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 7 - 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1933

National Discount Corp., etc.,

Plaintiff in Error,

vs.

Writ of Error to the Circuit

Marie P. Forbes, doing business

Court of Winnebago County

as Rockford Automotive, Ltd.,

Defendant in Error,

Baldwin, J:

This is a writ of error to the Circuit Court of Winnebago County to reverse a judgment of such court wherein the plaintiff in error (plaintiff in trial court) hereinafter designated plaintiff, brought suit against the defendant in error (defendant in trial court) hereinafter designated defendant, doing business as Rockford Automotive, Ltd.

The defendant was in the automobile business in Rockford and sold an automobile to one John W. Hug upon a certain conditional sales contract and note in the sum of \$435.67.

The defendant then sold this note and contract to the plaintiff and by her endorsement thereof guaranteed the payment of all installments when due. The note and contract so sold purport to be made between the Rockford Automotive, Ltd., and said Jack Hug. The endorsement by the defendant is as follows: "Rockford Automotive, Ltd., by Marie P. Forbes, Treas." The note and contract not having been paid the plaintiff in error filed this suit to recover therefor against the said Marie P. Forbes, trading as Rockford Automotive, Ltd.

The defendant filed her plea of general issue to the declaration and filed an affidavit of meritorious defense. By the affidavit so filed she denied that the signature, as

In the Appellate Court of Illinois

Second District

February Term, A. D. 1923

National Discount Corp., etc.,

Plaintiff in Error,

vs.

First of April in the Circuit

Court of Cook County

Marie F. Forbes, doing business

as Rockford Automotive, Ltd.,

Defendant in Error,

Baldwin, J.

This is a writ of error to the Circuit Court of Cook County

County to reverse a judgment of such court wherein the plaintiff

in error (plaintiff in trial court) hereinafter designated plain-

tiff, brought suit against the defendant in error (defendant in

trial court) hereinafter designated defendant, doing business as

Rockford Automotive, Ltd.

The defendant was in the automobile business in Rockford

and sold an automobile to one John E. Hug upon a certain conditional

sales contract and note in the sum of \$135.87.

The defendant then sold this note and contract to the

plaintiff and by her endorsement thereof transferred the payment

of all installments when due. The note and contract as sold

ought to be made between the Rockford Automotive, Ltd., and

said John E. Hug. The endorsement by the defendant as is alleged:

"Rockford Automotive, Ltd., by Marie F. Forbes, Treasurer, has

note and contract not having been paid the plaintiff in error

filed this suit to recover thereon against the said Marie F.

Forbes, trading as Rockford Automotive, Ltd.

The defendant filed her plea of denial in answer to the

declaration and filed an affidavit of verity of the same.

By the plaintiff as filed and decided that the same be, as

above set forth, was her personal signature and alleged as her defense that such signature was a corporate signature.'

A strict construction of the law would prevent the defendant in error from raising this defense without having filed her special plea therefor, but inasmuch as the parties to this suit have treated the same as though it were raised in a proper manner we are of the opinion that the defect in pleading has been waived.'

We need not detail the testimony introduced herein but upon the trial the defendant in error testifying on behalf of the plaintiff testified that the name Marie P. Forbes was her signature but that she did not write the words "Rockford Automotive, Ltd." The plaintiff offered testimony tending to prove its declaration and the facts and circumstances surrounding the transaction. In addition to the testimony it was stipulated upon the trial hereof by the respective attorneys that there is no such corporation as the Rockford Automotive, Ltd. At the close of the evidence for the plaintiff the defendant presented its motion for a verdict in favor of the defendant. Such motion was allowed and judgment entered against the plaintiff for costs. This motion was predicated upon the theory that the plaintiff in error was obligated to prove that such signature was not a corporate signature.

It is well settled law that the plaintiff has the burden of proving its case by a preponderance of the evidence but the burden of proving any special defense thereto rests upon the defendant.'

As was said in U. S. Wringer Co. vs. Cooney, 214 Ill. 520 page 525: "The term "burden of proof" is used in different senses. In one sense the term marks or expresses the burden or duty of the actor or party who has the risk or affirmative of the issue and will lose the case if he does not in the end establish such issue. In another sense the term means or expresses the burden or duty of a party, in order to succeed, of

above set forth, was her personal signature and the defense that such signature was a corporate signature. A strict construction of the law would require the defendant in error to maintain the defense without having filed her special plea thereto, but since now as the parties to this suit have treated the case as though it were raised in a proper manner we are of the opinion that the defect in pleading has been waived.

We need not detail the testimony introduced herein but upon the trial the defendant in error testifying on behalf of the plaintiff testified that the name Marie W. Jones was her signature but that she did not write the words "Hocutt and Motive, Ltd.". The plaintiff offered testimony tending to prove its declaration and the facts and circumstances surrounding the transaction. In addition to the testimony it was introduced upon the trial heard by the respective attorneys that there is no such corporation as the "Hocutt and Motive, Ltd.". At the close of the evidence for the plaintiff the defendant presented its motion for a verdict in favor of the defendant. Such motion was allowed and judgment entered against the plaintiff for costs. This motion was granted upon the theory that the plaintiff in error was obligated to prove that such signature was not a corporate signature.

It is well settled law that the plaintiff has the burden of proving the case by a preponderance of the evidence and the burden of proving any special defense should rest upon the defendant.

As was said in U. S. v. Brinson, 101 U.S. 370, page 378: "The term 'burden of proof' is used in different senses. In one sense the term means or expresses the burden or duty of the actor or a party who has the right or obligation of the issue and will lose the case if he does not in fact establish such issue. In another sense the term means or expresses the burden or duty of a party, in order to succeed, of

going forward, at any particular stage, with the evidence, and really means that the burden is upon him to establish the particular claim, while the burden of the issue, - that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other and sometimes back again. In general, the party who seeks to move a court in his favor, whether as an original plaintiff or as a defendant, who, by admitting plaintiff's contention and setting up an affirmative defense, becomes the real actor, must establish his claim." (Donovan vs. St. Joseph's Home, 295 Ill. 125).

Thus the burden of proving the cause of action alleged in its declaration was upon the plaintiff herein, but the defendant having alleged in defense of such cause of action that the signature attached to such guaranty endorsed upon the contract was a corporate signature and not her personal signature, had the burden of proving such defense.

The plaintiff in this case not only proved the execution and delivery of the contract, and signature of the defendant, but by the stipulation between the parties the plaintiff proved and thereby the defendant admitted that the signature was not a corporate signature. The plaintiff, therefore, having established its case by a preponderance of the evidence, it then became the duty of the defendant in error to establish her affirmative allegation in defense, if she could.

In Santa Rosa-Vallejo Tan. Co. vs. Kronauer & Co., 228 Ill. App. 236, p. 247 the court in passing upon a similar question said: "That as a general rule the burden of proof is on the plaintiff to establish his case by a preponderance of the evidence is elementary and scarcely requires the citation of authorities." Abhau vs. Grassie, 262 Ill. 636. It is, however, also true that

when under the pleadings it appears that a defendant relies upon an affirmative defense, the prima facie case of the plaintiff having been established, it is proper for the court to instruct the jury that the burden of establishing such affirmative defense is upon the defendant who asserts it."

Thus the defendant having the burden of proving the affirmative defense offered by her affidavit of merits, wholly failed to make the proof required of her and it was error for the court to allow the motion for verdict for the defendant.

The defendant in error having failed to meet the prima facie case made by the plaintiff in error, the action of the Circuit Court of Winnebago County was erroneous and the judgment of such court is reversed and the cause remanded.

REVERSED AND REMANDED.

when under the provisions it appears that a defendant is liable for an affirmative defense, the burden of proof is on the defendant. Having been established, it is proper for the court to instruct the jury that the burden of establishing an affirmative defense is upon the defendant who asserts it.

That the defendant failed to prove the affirmative defense of mistake, which failed to make her proof sufficient of her act, it was error for the court to allow the action for verdict for the defendant.

The defendant in error having failed to meet the affirmative defense of mistake, the action of the District Court of Winnebago County was affirmed and the judgment of such court is reversed and the same remanded.

REVEREND AND HONORABLE

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

#

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 609³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 8 1933

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A.D. 1933

Gustav H. Bunge, Herbert A.
Grotefeld, George H. Bunge
and Gordon C. Bunge, copartners
doing business as Bunge, Grotefeld
& Bunge,

(Plaintiffs) Appellees,

Appeal from the Circuit Court

vs.

of Du Page County

Downers Grove Sanitary District,
a municipal corporation,

(Defendant) Appellant.

PER CURIAM:

On May 28th, 1930 the appellees (plaintiffs in trial court) Gustav H. Bunge, Herbert A. Grotefeld, George H. Bunge and Gordon C. Bunge, co-partners doing business as Bunge, Grotefeld and Bunge, as attorneys at law, filed their declaration in assumpsit in the Circuit Court of Du Page County against the appellant (defendant in trial court) to recover the sum of \$36,100.00 alleged to be due them as attorneys' fee upon certain described contracts.

The declaration consisted of three counts and the common counts. By the various counts in the declaration it was alleged that the appellees as attorneys at law had been employed under a written contract dated June 26th, 1929 supplemented and modified by a subsequent contract dated August 10, 1929, for the furnishing of certain legal work of the defendant in the handling of special assessment proceedings, for the stipulated amounts set forth in the said contracts. To this declaration the general issue and several special pleas were filed, and an affidavit of meritorious defense. Considerable other pleading took place in the trial court, which we do not deem necessary to discuss. Ultimately the case was tried before a jury which returned a verdict for appellees for

the sum of \$25,000.00. This appeal is prosecuted to reverse the judgment entered thereon.

The declaration and the pleadings in this case, with the exception of the common counts, all appear to be predicated upon the theory that the appellees are seeking to recover on a contract. Also it was asserted by the appellees, by their counsel in his argument to the jury, that the appellees relied upon their contracts with the said appellant for the recovery in this case.

The contracts in question were introduced in evidence and testimony offered by the appellees relative to the work alleged to have been performed by this firm of attorneys in regard to certain special assessment proceedings. The records show that the special assessment proceedings referred to or contemplated by the contracts were, in fact, three in number but by the evidence are designated as four, that is to say, as proceedings Nos. 19, 26, 27 and 28. Numbers 19 and 26 relate to the same improvement. Both proceedings were identical in character and had for their purpose the levying of an assessment for the construction of a plant for the disposal of sewerage, including an outlet sewer and laterals. Upon an adverse decision in the court, proceeding No. 19 was dismissed and a new proceeding, identical therewith, was initiated as No. 26 and this proceeding appears to be yet pending in the courts. Proceeding No. 27 pertained to the construction of storm water drains and proceeding No. 28 pertained to the construction of sanitary sewers. Proceeding No. 28 was initiated to the point where a public hearing was called upon same but nothing further appears to have been done in connection therewith and so far as disclosed by the record the same is now pending at some stage uncompleted. Proceeding No. 27 was abandoned.

There is nothing in the record to show why the uncompleted proceedings had not been prosecuted to a final hearing or dismissed.

the sum of £10,000.00. This amount is proposed to be used for the purpose of the proposed scheme.

The resolution and the findings in this case will be the basis of the decision. All cases will be decided on the basis of the facts and the evidence. The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence.

The evidence in this case is based on the facts and the evidence. The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence.

The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence.

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The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence. The facts of the case will be decided on the basis of the evidence.

It is urged by appellant that Gustav H. Bunge, one of the appellees herein, was under a contract of employment with the appellant at the time of the making of the contract above referred to and that, therefore, any extra compensation above that contract is void and that no recovery could be had upon this additional contract.

The evidence discloses that Mr. Bunge received from the appellant certain payments, as retainer fee, each year for a number of years. It is a well settled principle of law that the payment and acceptance of a retainer is not such an employment in such sense as to constitute the attorney so retained an actual employee, but that such retainer is of such a nature as only prevents the attorney from taking a case against the party who so retains him and if the party so retaining him has legal work to be done, that he will be available for their services. For such purposes the parties are, therefore, at liberty to enter into a contract for the performance of any legal services requested or desired.

It therefore follows that the contention that Gustav H. Bunge was an employee of the appellant at the time of the making of the contract and, therefore, could not make a new contract, cannot be sustained.

It is next urged on behalf of the defendants that the judgment herein cannot be sustained for the reason that appellees filed their declaration and tried their case upon the theory of recovery upon a contract but that the proof offered in this case related to and was predicated upon a quantum meruit basis.

It is well settled law that where one seeks to recover upon a contract he must prove the contract alleged and the obligation thereof and the recovery, if any, can only be had upon and in accordance with the contract. In such cases evidence as to the nature and value of the services rendered by

It is argued by opponents that the proposed amendment is not a necessary part of the bill, and that the bill can be passed without it. It is also argued that the proposed amendment is not a necessary part of the bill, and that the bill can be passed without it.

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

with a 100% probability of success. The probability of success is 100% if

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the plan to ensure that the problem is being addressed effectively.

the plaintiff is incompetent since the recovery must be had, if at all, upon the contract itself and not alone upon the fact that services have been rendered and the value thereof.

It has often been said that where a contract has been repudiated by one party the other party to the contract may recover in quantum meruit. This is a correct statement of law, yet in such case the plaintiff may have a choice of remedies either by suit upon the contract or by suit to recover the value of the services rendered. He has this choice of remedies but he cannot have both. He must elect to proceed either upon the basis of the contract itself or upon the basis of the quantity and value of the services rendered. Evidence upon one theory does not support a recovery upon a declaration upon the other theory.

In this case at least two of the proceedings have not been completed and it is difficult to see how a cause of action could be maintained upon the contracts in evidence and a recovery had thereon.

A more difficult question is presented, however, in the objection that all of the special assessment propositions described by the evidence herein were ultra vires and void because it is said that the appellant exceeded its powers when it undertook to provide a sewerage disposal plant by building it with special assessment funds and when it undertook to provide for a storm water sewer in the same manner.

The Sanitary District Act, under which the appellant derives its powers, is described by its own terms to be "an Act to create sanitary districts and to provide for sewerage disposal."

Section 334 (1) Chapter 42 of Cahill's Illinois Statutes 1931 provides: "The board of trustees shall have the power to build and construct and to defray the costs and expenses of the construction of drains, sewers or laterals, or drains and

sewers and laterals and other necessary adjuncts thereto, including pumps and pumping stations, made by it in the execution or in furtherance of the powers heretofore granted to such sanitary district by special assessment or by general taxation, or partly by special assessment and partly by general taxation, as they shall by ordinance prescribe. * * * *

It is urged by the appellees herein that the use of the words "drains, sewers and laterals" in such statute is sufficient to authorize such sanitary district to build drains and storm sewers. However, such construction of the statute cannot prevail. The act authorizes the creation of sanitary districts for the purpose expressed in the title of the act and any language used in the act must have reference thereto. The term "drains" as used in this act is not susceptible of the application urged by the appellees.

In *Judge vs. Bergman*, 258 Ill. 246 page 251 the court said: "The sanitary district is a municipal corporation organized to secure, preserve and promote the public health. (*People vs. Nelson*, 133 Ill. 585). It derives its powers from the legislature, and can exercise only those that have been expressly delegated to it and such as are necessarily implied. (*City of Chicago vs. M. & M. Hotel Co.* 243 Ill. 264). Statutes granting powers to municipal corporations are strictly construed and any fair and reasonable doubt as to the existence of the power is resolved against the municipality claiming the right to exercise it. (*Seeger vs. Mueller*, 133 Ill. 86)."

In *Normal School vs. City of Charleston*, 271 Ill. 603, the City of Charleston as an inducement to secure the establishment of the Normal School, entered into a contract by which it was agreed to furnish all the water such school might require in its buildings and on its grounds and for fire protection for a consideration of the sum of \$5.00 for a period of fifty years. This agreement was carried out for a time but ultimately

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the city repudiated the contract and installed a meter system and demanded payment for the water used by the school. A bill for injunction was filed to restrain the collection of the moneys claimed and upon hearing the court dismissed the bill of complaint. In reference to the question the court said, page 605: "Municipalities are created primarily for the exercise of such portion of the powers of sovereignty within the corporate limits as the General Assembly may see fit to bestow upon them." Again on page 610 the court said: "The final argument in support of the bill is that the city is estopped to dispute the validity of the contract although it had no power to enter into it, for the reason that it has received the consideration. The reason did not prevail in any of the cases heretofore considered. Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for." (Stevens vs. St. Mary's Training School 144 Ill. 336; Hope vs. City of Alton, 214 Ill. 102; May vs. City of Chicago, 222 Ill. 595; People vs. Parker, 231 Ill. 478).'

It is urged by the appellees herein that even though the levying of the special assessment and the attempt to build the storm sewer and disposal plant were ultra vires, yet the right to make the contract was not ultra vires, and that therefore the contract was a binding and valid obligation.

While the power to contract is inherent in every municipal corporation with respect to any subject matter within its corporate powers (East St. Louis vs. St. Louis Gas Light and Coke Co. 98 Ill. 415), the doctrine of ultra vires has with good reason been applied to greater strictness to municipal bodies than to private corporations, and in general a municipality is not estopped from denying the validity of a contract made by its officers when it has no authority for making such

a contract. Since the powers of a municipal corporation are wholly statutory every person who deals with such a body is bound to know the extent of its authority. (Eastern Ill. St. Normal School vs. City of Charleston, 271 Ill. 603).

A contract entered into by a municipal corporation in relation to a subject matter upon which it has authority to act, but without compliance with the conditions which the legislature has prescribed as a necessary preliminary to contracts of such a character, is invalid because beyond the charter powers of the municipality, and is, in the broader meaning of the term, an ultra vires contract; but it is ultra vires in a secondary sense and is not dealt with as strictly as a contract relating to a subject matter with which the municipality has no power to deal. (Section 352 Municipal Corporations 19 R. C. L. page 1063)/

It is plainly apparent from a careful reading of the contracts introduced in this case that any compensation to the appellees herein was substantially a percentage of "the total sum of any general bond issue" payable in cash or "in special assessment vouchers or bonds for services rendered in connection with any special assessment proceeding" and as such was in effect and governed by the same rules of law. The appellees have already received certain vouchers issued against improvement number 26 as a part of the specified compensation.

From what has been said it follows that the appellant herein was without power under the statute to build the storm sewer or to build the disposal plant mentioned in the ordinances providing for such special assessments and, therefore, the contracts of appellees being in effect a part of and governed by such proceedings were ultra vires and void.

The judgment of the Circuit Court of Du Page County is reversed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 6094

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1933.

H. D. A. Grebe,

Plaintiff in Error.

vs.

Error to Circuit Court,
Lake County.

Harry E. Miller and Olive B.
Miller,

Defendants in Error.

WOLFE-P.J.

H. D. A. Grebe, complainant, filed in the lower court his bill in the Circuit Court of Lake County, Illinois, against Harry E. Miller and Olive B. Miller, husband and wife, the defendants in error, to foreclose a mechanics lien to the amount of \$8,479.94. The bill alleges that a written agreement had been entered into whereby the complainant was to furnish certain materials and labor used in the improvements made upon the premises described in the bill for the price of \$21,500.00 and that if any alterations were made in the plans that the cost of same and extras, plus ten per cent, was to be added to the contract price. The bill also alleges that the work was undertaken and completed on November 22, 1930; that payments were made by the defendant during the progress of the work; that within four months of the completion of the work a claim for a lien was filed in the Circuit Court of the County of Lake, State of Illinois, as provided by statutes.

The defendants filed their pleas to the said bill, admitting the terms of the contract, the furnishing of labor and material and that the complainant was entitled to a lien therefor but claimed that the parties had arbitrated their differences under an agreement in the following words: "Chicago, Illinois, December 3, 1930. IT IS

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
February Term, A.D. 1931.

H. D. A. Grebe,

Plaintiff in Error.

vs.

Harry E. Miller and Olive E.
Miller,
Defendants in Error.

WOLFE-P. J.

H. D. A. Grebe, complainant, filed in the lower court a bill

in the Circuit Court of Lake County, Illinois, against Harry E.

Miller and Olive E. Miller, husband and wife, the defendants in error,

to foreclose a mechanics lien to the amount of \$3,478.94. The bill

alleges that a written agreement had been entered into whereby the

complainant was to furnish certain materials and labor used in the

improvements made upon the premises described in the bill for the price

of \$21,500.00 and that if any alterations were made in the plans that

the cost of same and extras, plus ten per cent, was to be added to

the contract price. The bill also alleges that the work was under-

taken and completed on or before May 1, 1930; that payments were made by

the defendant during the progress of the work; that within two months

of the completion of the work a claim for a lien was filed in the

Circuit Court of the County of Lake, State of Illinois, as provided

by statutes.

The defendants filed their plea to the said bill, admitting

the terms of the contract, the furnishing of labor and material and

that the complainant was entitled to lien thereon but claimed that

the parties had submitted their differences under an agreement in

the following words: "On Chicago, Illinois, December 5, 1930. It is

AGREED by the undersigned parties that they will arbitrate any items that have been questioned by Mr. Miller in the building which Mr. Grebe has done on his farm at Barrington, Illinois; and that two men will be asked to decide on these items, i.e., Mr. Charles Williams and Mr. George Etters. These two men are to pick a third man and whatever the three men decide on as the proper amounts shall be paid by Mr. Miller."

H. E. Miller
H. D. A. Grebe

The plea further alleges that the abbitrators made an award in favor of the complainant in the sum of \$5,641.20 which amount the defendants tendered to the complainant and said tender was renewed and made in this case, which tender the complainant had refused except as to be applied on their account. The plea further alleges and states that they have continued to make such tender and are ready and willing to pay the amount as awarded and asked to be dismissed with their reasonable costs. To this plea the complainant filed a replication.

The case was referred to the Master in Chancery to take proof and the Master proceded to hear the evidence as presented by both sides to the controversy. The Master found in favor of the defendants upon the award. Exceptions to the Master's Report was filed and overruled by the Court. The Court entered a decree approving and confirming the Master's Report and found that the matters in controversy had been submitted to a board of arbitrators and that the parties were bound by the award thereon.

It is admitted by both parties to this controversy that the arbitrators did not follow the procedure or qualify as required by the statutes relative to arbitrators. The defendants in error contend that although this award is not valid in not complying with the arbitration statute of the State of Illinois; that the statute is not compulsory but is entirely voluntary, and the award in the

AGREED by the undersigned parties that they will execute and issue that have been questioned by Mr. Miller in the following manner: and that two men have done on the same at Birmingham, Alabama; and that two men will be asked to decide on these issues, i.e., Mr. Charles Williams and Mr. George Winters. These two men are to pick a third man and whatever the three men decide on as the proper amounts shall be paid by Mr. Miller."

J. B. Miller
H. O. A. Miller

The plea further alleges that the first vote was an award in favor of the complainant in the sum of \$5,000.00 which amount the defendants tendered to the complainant and said tender was refused and made in this case, which tender the complainant had refused except as to be applied in their account. The plea further alleges and states that they have continued to make such tender and are ready and willing to pay the amount as awarded and asked to be dismissed with their reasonable costs. To this plea the complainant filed a replication.

The case was referred to the Master in Chancery at the same time and the Master proceeded to hear the evidence as presented by both sides to the controversy. The Master found in favor of the defendants upon the award. Exceptions to the Master's Report were filed and overruled by the Court. The Court entered a decree approving and confirming the Master's Report and found that the matters in controversy had been admitted to a board of arbitrators and that the parties were bound by the award thereon.

It is alleged by both parties to this controversy that the arbitrators did not follow the procedure or comply as required by the statutes relative to arbitrators. The defendants in error contend that although this award is not valid in law, the arbitrators' award is not compulsory but is entirely voluntary, and that in the

case can be sustained under the rules of the common law. The plaintiff in error contends that the whole award is invalid and therefore not binding upon him. In the case of Eisenmeyer v. Salter 77 Illinois, 515, the Courts say: "Although the submission to arbitration may not have been in conformity with the provision of the statute on that subject, the award for that reason was not invalid. It may be true that no judgment could have been rendered upon it under the statutes, but it was good at common law and the parties could maintain there independent action upon it." This principal of the law has been followed in the case of Casstevens v. Casstevens, 227 Illinois, Page 547, in which the Court says: "The award, if not accompanied by such fraud or mistake that would render it voidable, would be binding upon the parties who signed the agreement as a common law submission to arbitration."

In the case of the White Eagle Laundry Co. vs. Slawek, 296 Ill., 244, the Court in discussing the matter of arbitration of differences between litigants used the following language: "The appellants contend that the provision is unconstitutional because it deprives the parties of property without due process of law and confers judicial powers on individuals not recognized by the constitution. It is true that arbitration is in the nature of a judicial inquiry, but the statute confers no judicial powers upon arbitrators. It is not compulsory but is entirely voluntary. If parties choose to submit their controversies to arbitration they have the right of doing so, the object of arbitration is to avoid the formalities of delay and expense attending litigation in the court, and it has been recognized from a very early period by the common law and is a method of settling disputes. At common law an agreement could be entered into by parol to arbitrate any cause or action which did not involve the title to land, and an award was ~~in~~ a full and final adjustment of

case can be sustained under the rules of the common law. The plaintiff in error contends that the whole case is invalid and therefore not binding upon him. In the case of *Wheat*, 101 U.S. 271, 12 Wall. 271, the Court said: "Although the arbitration may not have been in conformity with the provision of the statute on that subject, the award for that reason was not invalid. It may be true that no judgment could have been rendered upon it under the statute, but it was good at common law and the parties could maintain there independent action upon it." This principle of the law has been followed in the case of *Greenough v. Gassenden*, 227 Illinois, 185, 103 Ill. 2d 185, in which the Court says: "The award, if not accompanied by such fraud or mistake that would render it voidable, would be binding upon the parties who signed the agreement as a common law arbitration to arbitration."

In the case of *The State Bank Laundry Co. v. Elmer*, 101 Ill. 244, the Court in discussing the matter of arbitration of differences between litigants used the following language: "The arbitrators tend to the provision is unconstitutional because it deprives the parties of property without the process of law and contrary to the powers on individuals not recognized by the constitution. It is true that arbitration is in the nature of a judicial inquiry, but the statute confers no judicial powers upon arbitrators. It is not compulsory but is entirely voluntary. If parties choose to submit their controversies to arbitration they have the right to do so, but the object of arbitration is to avoid the formalities of law and expense attending litigation in the courts, and it is not recognized from a very early period by the common law and is a method of settling disputes. At common law an agreement could be entered into by parcel to arbitrate any cause or action without any loss of the title to land, and an award was as a final and binding judgment."

the controversy, having all the force of an obligation and fully concluding the parties from again litigating the same subject. (Smith v. Douglas, 16 Ill., 34.) The statute in making the agreement irrevocable, confers no new power and takes away no inalienable right. It simply recognizes the agreement of the parties and enforces it. Before the statute was enacted the Court would not specifically enforce the agreement to arbitrate, but left the parties to other remedies at law for a breach of the contract. The effect of making the agreement irrevocable was merely to provide for the specific enforcement of the contract and it violated no constitutional rights. It conferred no power on individuals but provided for a method of carrying into effect the contract of the parties."

In this case the cause was submitted to a Master in Chancery who took the evidence and found in favor of the defendant in error. the Court after reviewing the evidence, approved the Master's report. A review of the evidence in this case shows that it is contradictory relative to what the parties intended to arbitrate when they signed the agreement. There is no fraud charged or proven in the case and after parties have agreed to arbitrate their controversies, unless there is fraud or mistake shown, we think that the arbitrators award should be enforced and be binding upon the parties. We are not prepared to say the findings of the Master in Chancery and approved by the Chancellor are against the clear weight of the evidence, and the decree, therefore, should be, and is hereby affirmed.

Judgment affirmed.

the controversy, having all the force of an obligation and still concluding the parties from again litigating the same subject. (111 v. Douglas, 18 Ill., 34.) The statute in making the agreement irrevocable, confers no new power and takes away no individual right. It simply recognizes the agreement of the parties and enforces it. Before the statute was enacted the Court would not specifically enforce the agreement to arbitrate, but left the parties to their remedies at law for a breach of the contract. The effect of making the agreement irrevocable was merely to provide for the specific enforcement of the contract and it violated no constitutional rights. It conferred no power on individuals but provided for a method of carrying into effect the contract of the parties."

In this case the cause was submitted to a master in Chancery who took the evidence and found in favor of the defendant in error. The Court after reviewing the findings, approved the master's report. A review of the evidence in this case shows that it is contradictory relative to what the parties intended to arbitrate when they signed the agreement. There is no fraud charged or proven in this case and the parties have agreed to arbitrate their controversy, unless there is fraud or mistake shown, we hold that the arbitrator's award should be enforced and be binding upon the parties. We are not prepared to say the findings of the master in this case are approved by the Chancellor are against the clear weight of the evidence, and we decree, therefore, should be, and is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 609⁵

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1933.

People of the State of Illinois,
on the relation of and in the name
of Oscar Nelson, Auditor of Public
Accounts of the State of Illinois,

Complainants,

vs.

United State Bank of Crystal Lake,
a corporation,

Defendant.

Appeal from the Circuit
Court of Mc Henry County.

C. Percy Barnes, Administrator De
Bonis Non of the Estate of William
H. Rupert, Dec'd.,

Intervenor Appellee,

vs.

Frank J. Green, Receiver for United
State Bank of Crystal Lake,

Appellant.

WOLFE- P.J.

On July 3, 1931, a bill of complaint was filed in the Circuit Court of McHenry County against the United State Bank of Crystal Lake. Said Bank was declared to be insolvent. Frank J. Green was appointed receiver to take charge of the assets and control of the said bank. On November 17, 1931, C. Percy Barnes, as administrator de bonis non of the estate of William H. Rupert, filed a claim against the receiver in which he alleged that Lynn Richards, former cashier of the United State Bank, had been the original administrator of the Rupert estate, and as such administrator had committed a series of defalcations.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1933.

People of the State of Illinois,
on the relation of and in the name
of Oscar Nelson, Auditor of Public
Accounts of the State of Illinois,

Complainants,

vs.

United States Bank of Crystal Lake,
a corporation,

Defendant.

Appeal from the Circuit
Court of McHenry County.

O. Percy Barnes, Administrator of
Estate of William H. Rupert, Dec'd.,
Intervenor Appellee,

vs.

Frank J. Green, Receiver for United
State Bank of Crystal Lake,

Appellant.

WOLFE-P.1.

On July 3, 1931, a bill of complaint was filed in the Circuit
Court of McHenry County against the United States Bank of Crystal Lake.
Said Bank was declared to be insolvent. Frank J. Green was appointed
receiver to take charge of the assets and control of the said bank.
On November 17, 1931, O. Percy Barnes, as administrator of the estate
of the estate of William H. Rupert, filed a claim against the receiver
in which he alleged that Lynn Richards, former cashier of the United
State Bank, had been the original administrator of the Rupert estate,
and as such administrator had committed a series of delinquencies.

Pursuant to an order granting leave for the same, Barnes, as such administrator, on October 28, 1932, filed an intervening petition setting out more fully the circumstances upon which the claim is based. The pertinent allegations of this petition was subsequently stipulated as true. The stipulation of facts is as follows: "It is hereby stipulated by and between A. Percy Barnes, administrator of the estate of William H. Rupert, deceased, by David R. Joslyn, Jr., his attorney, and the United State Bank of Crystal Lake, Illinois, Frank J. Green, receiver, by William M. Carrohl, his attorney, as follows:

1. That the United State Bank of Crystal Lake was on the date of its closing, to-wit: on May 29, 1931, and for many years previous thereto had been a duly organized State Bank under the laws of Illinois, located at and doing a general banking business at its bank building in Crystal Lake, Illinois.
2. That said Bank was by the said Auditor of the State of Illinois, and through the actions of its Board of Directors closed on May 29, 1931, and that Frank J. Green was on June 29, 1931, and is now the duly appointed, qualified and acting receiver of said bank, and is endeavoring to liquidate the assets thereof.
3. That the managing officers of said bank who had charge of its daily business matters were Lynn Richards, its cashier, and W. H. Wilbur, its president, and that both of said officers are and had been for many years previous to its closing, cashier and president respectively, and managing officers of said bank, and that a large part of the business and affairs of said bank were conducted by Lynn Richards exclusively, without consulting and without the approval of any other officer or director of said bank.
4. That one, William H. Rupert of Crystal Lake, Illinois, died intestate on or about the 27th day of November, A.D. 1929, and that the said Lynn Richards while still cashier of said bank was on December

Pursuant to an order granting leave for the said James, as administrator, on October 28, 1933, filed in intervening petition setting out more fully the circumstances upon which the claim is based. The pertinent allegations of this petition was substantially

stipulated as true. The stipulation of facts is as follows: "It is hereby stipulated by and between A. Percy Barnes, administrator of the estate of William H. Rupert, deceased, by David H. Joselyn, Jr., his attorney, and the United State Bank of Crystal Lake, Illinois, Frank J. Green, receiver, by William H. Carroll, his attorney, as follows:

1. That the United State Bank of Crystal Lake was on the date of its closing, to-wit: on May 28, 1931, and for many years previous thereto had been a duly organized State Bank under the laws of Illinois located at and doing a general banking business at its bank building in Crystal Lake, Illinois.

2. That said Bank was by the said Auditor of the State of Illinois, and through the action of its Board of Directors closed on May 28, 1931, and that Frank J. Green was on June 30, 1931, and is now the duly appointed, qualified and acting receiver of said bank, and is endeavoring to liquidate the assets thereof.

3. That the managing officers of said bank who had charge of its daily business matters were Lynn Richards, its cashier, and J. M. Wilbur, its president, and that both of said officers are and have been for many years previous to its closing, cashier and president respectively, and managing officers of said bank, and that a large part of the business and affairs of said bank were conducted by Lynn Richards exclusively, without consulting and without the approval of any other officer or director of said bank.

4. That one, William H. Rupert of Crystal Lake, Illinois, died intestate on or about the 27th day of November, A.D. 1929, and that the said Lynn Richards while still cashier of said bank was on December

4, 1929, appointed administrator of the estate of the said William H. Rupert, and qualified as such administrator, and on said date gave an administrator's bond in the sum of \$8,000.00, signed by himself as principal, with W. H. Wilbur, president of said bank, and Elton T. Huffman, assistant cashier of said bank as sureties thereof, which bond was approved by the County Court of McHenry County, and that the said Lynn Richards died intestate on June 16, 1931, and that from the time of his appointment until the time of his death he was still the duly appointed, qualified and acting administrator of the estate of said William H. Rupert, deceased, and the cashier of said bank.

5. That on the 27th day of January, A.D. 1930, under an order of the County Court of McHenry County, the said Lynn Richards as administrator of said estate gave an additional administrator's bond in the sum of \$26,000.00 with himself as principal, W. H. Wilbur, president of said Bank, E. T. Huffman, assistant cashier of said bank, and E. T. Bryant, a director of said bank, as sureties thereof, which bond was approved by said County Court.

6. That C. Percy Barnes of Woodstock, Illinois, was after the death of the said Lynn Richards, to wit: on the 22nd day of June, 1931, duly appointed by the County Court of McHenry County, administrator de bonis non of said estate, and is now the duly qualified and acting administrator of said estate.

7. That the said Lynn Richards as such administrator proceeded to administer said estate, filed an inventory, petition to sell personal property, made report of sale, established claim day, and the files of the Probate Court of Mc Henry County in said estate are hereby made a part of this stipulation of facts.

8. That the said Lynn Richards as shown by the ~~per~~ report of sale filed by him on April 9, A.D. 1931, in the Probate Court of McHenry County received from the sale of personal property in said estate the

4. 1939, appointed administrator of the estate of the said William H. Rupert, and qualified as such administrator, and on said date gave an administrator's bond in the sum of \$8,000.00, attested by himself as principal, with W. H. Wilbur, president of said bank, and Elton T. Huffman, assistant cashier of said bank as sureties thereof, which bond was approved by the County Court of Henry County, and that the said Lynn Richards died intestate on June 10, 1931, and that from the time of his appointment until the time of his death he was still the duly appointed, qualified and acting administrator of the estate of said William H. Rupert, deceased, and the cashier of said bank.

5. That on the 27th day of January, A.D. 1930, under an order of the County Court of Henry County, the said Lynn Richards as administrator of said estate gave an additional administrator's bond in the sum of \$8,000.00 with himself as principal, W. H. Wilbur, president of said bank, E. T. Huffman, assistant cashier of said bank, and T. T. Bryant, a director of said bank, as sureties thereof, which bond was approved by said County Court.

6. That C. Percy Barnes of Woodstock, Illinois, was after the death of the said Lynn Richards, to-wit: on the 22nd day of June, 1931, duly appointed by the County Court of Henry County, administrator de bonis non of said estate, and is now the duly qualified and acting administrator of said estate.

7. That the said Lynn Richards as such administrator proceeded to administer said estate, filed an inventory, petition to sell personal property, made report of sale, established claim day, and the files of the Probate Court of Henry County in said estate are hereto made a part of this stipulation of facts.

8. That the said Lynn Richards as shown by the last report of sale filed by him on April 6, A.D. 1931, in the Probate Court of Henry County received from the sale of personal property in said estate the

sum of \$2,929.25, and that the said Lynn Richards as such administrator received from the collection of the book accounts due to the said William H. Rupert, deceased, said figures having been given by the said Lynn Richards to Charles P. Barnes, his attorney, the sum of \$488.57, and that the balance standing in the name of William H. Rupert in the United State Bank at the time of his death was the sum of \$78.86.

9. That the said Lynn Richards while cashier of said bank and also being the administrator of said estate, immediately upon his appointment, to-wit: On December 14, 1929, opened up a bank account in said United State Bank of Crystal Lake under the name of Lynn Richards, administrator of the estate of William H. Rupert, deceased, and a copy of said bank account being hereto attached, Exhibit 1, and that as shown by said bank account the said Lynn Richards on November 8, 1930, transferred from said administrator's account to his own personal account, the sum of \$133 leaving a balance in said account of 70¢ which remained the condition of said administrator's account at the time of the death of the said Lynn Richards.

10. That as shown by the auditor's report, he also used the funds of said William H. Rupert estate and transferred from the account of Lynn Richards, administrator of the estate of William H. Rupert, deceased, by issuing a debit slip, and caused the money so debited to be credited or deposited to the following accounts in the following amounts, respectively:

Lynn Richards, personally	\$177.86
Lynn Richards, administrator of the	
Adrian estate	569.97
Lynn Richards, administrator of the	
Elmer Magoon estate	89.40
Lynn Richards, personally as stated	
above	<u>133.00</u>

a total of \$970.23

which amounts were charged against the bank account of Lynn Richards as administrator of the William H. Rupert estate.

11. That the said Lynn Richards as such administrator on May 8, 1930, received from the Treasurer of the United States of America, a check

and of \$3,050.25, and that the said Lynn Richards is now administrator
received from the collection of the book accounts and by the said
William H. Rupert, deceased, said figures having been given by the
said Lynn Richards to Charles P. Barnes, his attorney, the sum of
\$438.50, and that the balance standing in the name of William H.
Rupert in the United State Bank at the time his death was the sum
of \$79.88.

9. That the said Lynn Richards while acting as said bank and also
being the administrator of said estate, immediately upon his appoint-
ment, to-wit: On December 14, 1923, opened up a bank account in said
United State Bank of Crystal Lake under the name of Lynn Richards,
administrator of the estate of William H. Rupert, deceased, and a
copy of said bank account being hereto attached, Exhibit 1, and that
as shown by said bank account the said Lynn Richards on November 8,
1930, transferred from said administrator's account to his own per-
sonal account, the sum of \$188 leaving a balance in said account of
70¢ which remained the condition of said administrator's account at
the time of the death of the said Lynn Richards.

10. That as shown by the auditor's report, he also used the funds
of said William H. Rupert estate and transferred from the account of
Lynn Richards, administrator of the estate of William H. Rupert, de-
ceased, by issuing a debit slip, and caused the money so debited to
be credited or deposited to the following accounts in the following
amounts, respectively:

Lynn Richards, personally	\$17.30
Lynn Richards, administrator of the	
Estate of	\$38.00
Lynn Richards, administrator of the	
Estate of	\$2.00
Lynn Richards, personally	\$1.00
above	\$1.00
Total of	\$59.30

which amounts were charged against the bank account of Lynn Richards
as administrator of the William H. Rupert estate.

11. That the said Lynn Richards as such administrator on May 2, 1930,
received from the Treasurer of the United States of America, a check

for \$10,000. payable to himself as administrator of the estate of William H. Rupert, deceased, being the proceeds of a life insurance policy upon the life of William H. Rupert, deceased, who was a World War Veteran, a facsimile copy of said check, with all endorsements thereon being hereto attached, Exhibit 2.

12. That the total cash receipts received by the said Lynn Richards as administrator of said estate was the sum of \$13,496.68, and that the total amount paid out by said Lynn Richards, as administrator of said estate, in connection with his administration of said estate, and as near as can be ascertained by the present administrator after a lengthy investigation is the sum of \$3,334.76.

13. That the said Lynn Richards as such administrator received said check of \$10,000. from the United States Government on or about May 8, 1930, and on the same day, while cashier of said bank, and as administrator of said estate, properly endorsed said check, delivered it to the said United State Bank and took in payment therefor from said bank the following:

- A. The A. W. Wilbrandt note of \$5,000. with accrued interest thereon of \$12.30 or a total of \$5012.30
- B. The Henry Karstens note of \$11.00 with accrued interest of \$5.26 or a total of 1105.26
- C. A demand certificate of deposit of said bank payable to the order of himself as administrator, for the sum of 3882.44

or a total of \$10,000.00
a copy of said items A. and C. Exhibits 3 and 4, being hereto attached, being the entire proceeds of said check, and that said check although payable to the administrator of the estate of William H. Rupert was not in any way credited to said estate.

14. That on May 12, 1930, the said Lynn Richards, while cashier of said bank, endorsed said demand certificate of deposit for \$3,882.44 personally, although it was payable to him as administrator, turned it in to said bank, together with his personal check for \$844.03,

for \$10,000 payable to himself as administrator of the estate of William H. Henson, deceased, being the proceeds of a life insurance policy upon the life of William H. Henson, deceased, who was a World War Veteran, a facsimile copy of said check, with all endorsements thereon being hereto attached, Exhibit B.

12. That the total cash receipts received by the said administrator of said estate was the sum of \$13,450.08, and that the total amount paid out by said administrator, as administrator of said estate, in connection with the administration of said estate, and as near as can be ascertained by the present administrator of said estate, is the sum of \$3,324.73.

13. That the said administrator as said administrator received cash of \$10,000 from the United States Government on or about May 8, 1930, and on the same day, said cash was deposited in said bank, and as administrator of said estate, properly endorsed said check, delivered it to the said United State Bank and took no payment therefor from said bank the following:

- A. The A. W. Henson estate of \$10,000, with accrued interest thereon at 4% per annum to a total of \$10,400.00.
- B. The Henry Kravitz estate of \$10,000 with accrued interest of \$2.30 on a total of \$10,023.00.
- C. A demand certificate of deposit of said bank payable to the order of himself as administrator, for the sum of \$10,000.00.
- D. A copy of said estate of A. W. Henson and C. Kravitz, and a copy of said estate of Henry Kravitz, and that said check delivered to the administrator of the estate of William H. Henson be not in any way credited to said estate.
14. That on May 13, 1930, the said administrator, with order of said bank, endorsed said demand certificate of deposit for \$10,000.00, personally, although it was payable to him as administrator, turned it in to said bank, together with his personal check for \$2,425.08.

Exhibit 5, and paid to said bank two notes of Elmer Magoon, deceased, which were owned by said bank, totaling in principal and interest \$4,766.47

15. That the said Lynn Richards, at said time, and for some time previously, was administrator of the estate of the said Elmer Magoon, deceased, and that said two notes above mentioned had been presumed to have been paid to said bank; that on February 17, 1930, or almost three months previous to the date, a receipt was issued by the United State Bank of Crystal Lake, by E. T. Huffman, assistant cashier, which receipt showed it was in full of the claims filed and allowed against the Magoon estate, in the County Court of McHenry County, Illinois, in favor of said United State Bank of Crystal Lake, which claims consisted of the two notes above mentioned, a copy of said receipt being hereto attached, Exhibit 6. The said notes were on February 17, 1930, presumed to have been paid out of money then in the hands of Lynn Richards, administrator of the estate of Elmer Magoon, deceased, but the money in payment of said notes was not actually paid to the bank until said certificate of deposit in the sum of \$3,884.44 was turned over to the bank by the said Lynn Richards, and said notes canceled. The report in the County Court filed in February, 1930, shows conclusively the payment of these notes, and the files of the County Court of McHenry County in the Elmer Magoon estate are hereby made a part of this stipulation. Copy of final report attached as Exhibit 7.

16. That the said Lynn Richards, while still administrator of the estate of William H. Rupert, deceased, sold or placed the A. W. Wilbrandt note in the principal sum of \$5000.00 in said bank, and at the same time, while cashier of said bank, accepted and bought said note for said bank, and gave credit for the \$5000. by paying an item of indebtedness owed by him to the bank, consisting of the personal note of Lynn Richards, in the principal sum of \$2,500. carried in the cash drawer of said bank as cash, and that the other \$2,500. was deposited to the personal account of the said Lynn Richards. Copy of deposit ticket attached as Exhibit 8.

Exhibit 5, and paid to said bank two notes of Elmer Watson, deceased, which were owned by said bank, totaling in principal and interest \$4,708.47.

18. That the said Lynn Richards, at said time, and for some time previously, was administrator of the estate of the said Elmer Watson, deceased, and that said two notes above mentioned had been presumed to have been paid to said bank; that on February 17, 1930, or almost three months previous to the date, a receipt was issued by the United State Bank of Crystal Lake, by J. T. Whitten, assistant cashier, which receipt showed it was in full of the claims filed and allowed against the Watson estate, in the County Court of McHenry County, Illinois, in favor of said United State Bank of Crystal Lake, which claim contained a copy of said receipt being stated of the two notes above mentioned, a copy of said receipt being hereto attached, Exhibit 8. The said notes were on February 17, 1930, presumed to have been paid out of money then in the hands of Lynn Richards, administrator of the estate of Elmer Watson, deceased, but the money in payment of said notes was not actually paid to the bank until said certificate of deposit in the sum of \$2,800.00 was turned over to the bank by the said Lynn Richards, and said notes cancelled. The report in the County Court filed in February, 1930, shows conclusively the payment of these notes, and the filing of the County Court of McHenry County in the Elmer Watson estate whereby said a part of this stipulation. Copy of final report attached as Exhibit 7.

19. That the said Lynn Richards, while still administrator of the estate of William H. Kuyper, deceased, sold or placed the A. J. Willmott note in the principal sum of \$1000.00 in said bank, and at the same time, while cashier of said bank, accepted and bought said note for said bank, and gave credit for the \$500.00 by paying on it a note of indebtedness owed by him to the bank, consisting of the personal note of Lynn Richards, in the principal sum of \$500.00, which was cashed by said bank as cash, and that the other \$500.00 was deposited to the personal account of the said Lynn Richards. Copy of deposit ticket attached as Exhibit 9.

17. That on May 12, 1930, the said Lynn Richards, while still administrator of the William H. Rupert estate transferred or sold and placed the said note of Henry Karsten, in the principal sum of \$1100. in said bank, and as cashier of said bank, bought and accepted said note for the bank, and had the proceeds from said note credited to the personal account of the said Lynn Richards.

18. That the said Lynn Richards used the proceeds received by him personally from the credit to his personal account of the \$2,500. received on the A. W. Wilbrandt note, and the \$1100. on the Henry Karsten note to pay various items of indebtedness owed by him personally, and various interest and other indebtedness owed by him to the said United State Bank of Crystal Lake, and that none of said sums of money were used by the said Lynn Richards for the payment of any debt or debts due by the William H. Rupert estate, or paid by the said Lynn Richards for or on behalf of the said William H. Rupert estate, a copy of the personal bank account of the said Lynn Richards, being hereto attached, Exhibit 9, showing credits and debits in regard thereto.

19. That all transactions in connection with the above matters are in the handwriting of Lynn Richards, except the receipt in the Magoon estate under date of February 17, 1930, which is signed by E.T. Huffman, assistant cashier of said bank, and except a note registered and ledger of said bank, which are in typewriting.

20. That all of said transfers of money from the bank account of Lynn Richards, administrator of the estate of William H. Rupert, as hereinbefore set forth, including the misappropriation by him of the check of \$10,000. received by him as administrator of said estate from the United States Government, which moneys were transferred to various accounts, including his personal account, as hereinbefore set forth, were not made on behalf of or for the use or benefit or for any indebtedness due from the estate of William H. Rupert, deceased, and were made by the said Lynn Richards illegally and unlawfully and without

17. That on May 18, 1930, the said Lynn Richards, with still the administrator of the William M. Robert estate transferred on said note placed the said note of Henry Karsten, in the principal sum of \$100,000, in said bank, and as cashier of said bank, bought and accepted said note for the bank, and had the proceeds from said note credited to the personal account of the said Lynn Richards.

18. That the said Lynn Richards used the proceeds received by him personally from the credit to his personal account of the \$100,000 received on the A. W. Richmond note, and the \$100,000 of the Henry Karsten note to pay various items of indebtedness owed by him personally, and various interest and other indebtedness owed by him to the said United State Bank of Crystal Lake, and that none of said items of money were used by the said Lynn Richards for the payment of any debt or debts due by the William M. Robert estate, or paid by the said Lynn Richards for or on behalf of the said William M. Robert estate, a copy of the personal bank account of the said Lynn Richards, being hereto attached, Exhibit B, showing credits and debits in regard thereto.

19. That all transactions in connection with the above matters are in the handwriting of Lynn Richards, except the receipt in the above estate under date of February 17, 1930, which is signed by E. T. Karsten, assistant cashier of said bank, and which a note registered and ledger of said bank, which are in apposition.

20. That all of said transfers of money from the bank to or from Lynn Richards, administrator of the estate of William M. Robert, as hereinbefore set forth, including the whole appropriation by him of the check of \$10,000, received by him as administrator of said estate from the United States Government, which money were transferred to various accounts, including his personal account, as hereinbefore set forth, were not made on behalf of or for the use or benefit of any indebtedness due from the estate of William M. Robert, deceased, and were made by the said Lynn Richards illegally and unlawfully and without

any proper authority so to do, and that said Lynn Richards personally used said funds in the payment of his personal debts and obligations and that the estate of William H. Rupert received no benefit whatsoever therefrom, and that all of said transactions appear on the records and files in the books of the United State Bank of Crystal Lake.

21. That Mrs. Richards, the wife of the said Lynn Richards, wrote checks on the United State Bank of Crystal Lake and signed her name thereto, and said checks were cashed by said bank and charged against the personal account of Lynn Richards, and said checks were honored in the same way and from the same account as the checks of Lynn Richards.

22. That on to-wit: the 8th day of May, 1930, at the time of the receipt of the said \$10,000. check from the United States Government, the said United State Bank of Crystal Lake had in its hands in cash and in cash items due from banks, the sum of \$98,704.17. That on to-wit: the 12th day of May, 1930, the said cash items amounted to \$115,690.24; and that on the 7th day of June, 1930, the said cash items amounted to the sum of \$80,428.73, and that on the 29th day of May, 1931, the day said bank closed, the same cash items amounted to the sum of \$24,221.20, according to the books of said bank, but that the said Frank J. Green, receiver, could only locate cash assets in the sum of \$24,000.92; and that on said 29th day of May, 1931, the total assets of said United State Bank amounted to the sum of \$738,526.25.

23. That the said C. Percy Barnes, administrator de bonis non of the estate of William Rupert, deceased, expressly reserves the right in the event of an adverse decision on his claim, on the facts as above set forth, or any time when he may believe it necessary or proper, to offer additional evidence on said claim."

On December 17, 1932, the court entered a decree in favor of the administrator Barnes against Frank Green, as receiver, for the total sum of \$8,951.74, as a preferred claim against the cash on hand in the United State Bank of Crystal Lake at the time of its closing.

any proper authority as to do, and that said bank received and retained the same as the property of said bank and of its officers and directors, and that the estate of William H. Rupert received no benefit therefrom, and that all of said transcripts appear on the records and files in the books of the United States Bank of Crystal Lake.

21. That Mrs. Richard, the wife of the said John Richard, wrote checks on the United States Bank of Crystal Lake and signed her name thereto, and said checks were cashed by said bank and entered against the personal account of John Richard, and said checks were honored in the same way and from the same account as the checks of John Richard.

22. That on to-wit: the 1st day of May, 1930, at the time of the receipt of the said \$10,000. check from the United States Government, the said United States Bank of Crystal Lake had in its hands in cash and in cash items from banks, the sum of \$93,704.17. That on to-wit: the 18th day of May, 1930, the said cash items amounted to \$115,000.24; and that on the 7th day of June, 1930, the said cash items amounted to the sum of \$80,434.73, and that on the 24th day of May, 1931, the said cash items amounted to the sum of \$24,732.20, according to the books of said bank, but that the said Frank J. Green, receiver, could only locate cash items in the sum of \$24,000.24; and that on said 24th day of May, 1931, the total assets of said United States Bank amounted to the sum of \$763,584.25.

23. That the said J. Percy Barnes, administrator of the estate of William H. Rupert, deceased, expressly reserves the right in the event of an adverse decision on his claim, on the facts as above set forth, or any time when he may believe it necessary or proper, to offer additional evidence on said claim.

On December 17, 1932, the court entered a decree in favor of the administrator against Frank Green, as receiver, for the total sum of \$8,781.74, as a preferred claim against the cash on hand in the United States Bank of Crystal Lake at the time of its closing.

The same questions as presented by this appeal were decided by this court in the case of Ella Hunt vs. Frank J. Green, receiver of the United State Bank of Crystal Lake, etc., general No. 8580, which was before this court at the February Term, 1933. In the Hunt case we say: "One of the defenses interposed by the appellant in the case is, that the bank was the holder of the note in due course. A holder in due course is one who has taken the instrument under the following conditions: That the instrument is complete and regular upon its face; that it became the holder of it before it became over-due, or without notice that it had previously been dishonored, if such was the fact. That he took it in good faith and for value; that at the time it was negotiated to him he had no notice of any informality in the instrument or defect in the title of the person negotiating it.

The appellant and the appellee differ upon the question as to who has the burden of proof to show that the bank was the holder of the note in due course. Where the title of any person who has negotiated an instrument, was defective, the burden is on the holder to prove that he or some person under whom he claimed to have the title, is a holder in due course. It is our opinion that if the appellee had proven the ownership of the note, that she had not authorized its sale or transfer, then the burden of proof was cast upon the appellant to prove that they were the holders of the note in due course of business; and this they have failed to do.

We think that it is proper to take into consideration in determining this question, the manner in which the note was handled. It apparently was sold to the bank and got out of the possession of the bank and was again returned to the bank and found in its possession. This was known to the bank, or by its managing representative, its cashier, Lynn Richards. The cashier of a bank is a general agent for the transaction of the business of the bank. - Pfeffer v. Farmers State Bank, 263 Ill. App. 360; Hansel v. First Nat'l Bank 115 Ill. App. 127.

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State Bank, 222 Ill. App. 520; *Central v. First Nat'l Bank*, Ill. 127.

See also, *Bank of America v. Richardson*, 100 Cal. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903,

The information, therefore, of Lynn Richards, the cashier, was the information of the bank.

It is the contention of the appellant that, although the United State Bank of Crystal Lake may not successfully contend that it was the owner and holder in due course of the note in question, the receiver of the bank stands in a different position from the bank for the purpose of marshaling the assets of the bank for the benefit of its creditors, and in law the receiver is an innocent holder of such assets. He cites several cases to support this contention but an examination of all the cases cited shows that negotiable paper of some kind had been given to the bank for the purpose of bolstering up its assets, or to assist in making it appear to be a going concern, so that a fraud or deception is worked by a bank on depositors or the public generally, and in such cases the courts have uniformly held that the maker of such notes is estopped from denying the validity of the same, and the receiver of the insolvent bank holds the assets as an innocent holder for value. Such is not the fact in this case. Mrs. Hunt, the owner of the note in question, did nothing that could be criticised as being fraudulent as against any one. Her dealings were open and above board, and perfectly legitimate. The receiver holds the property coming into his hands only by the same right of title as the person for whose property he is the receiver, subject, however, to liens, equities, etc., existing at the time of his appointment."

It is our opinion that the United State Bank of Crystal Lake, should be charged with the knowledge that its cashier, Lynn Richards, was committing the fraudulent acts as set forth in the stipulation. The court properly found that the estate of William H. Rupert has a preferred claim against the cash assets of the bank at the time it was closed.

The court in its order allowed interest on the claim from May 12, 1930. The bank received little, if any, benefit from the transactions of Lynn Richards while he was acting as such administrator of the

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It is our opinion that the United State Bank of Crystal Lake should be charged with the knowledge that its cashier, Lynn Richards, was committing the fraudulent acts as set forth in the stipulation. The court properly found that the estate of William A. Rupert has a preferred claim against the cash assets of the bank at the time it was closed.

The court in its order allowed interest on the claim from May 12, 1930. The bank received title, if any, benefit from the transactions of Lynn Richards while he was acting as such administrator of the

Rupert estate. The stipulation shows that the money he received from the estate was withdrawn from the bank within a short time. The bank was not guilty of any fraud, but has retained the money under a claim that it is entitled to do so. Under such circumstances as in this case it is our opinion that interest should not have been allowed on this claim.

The decree of the Circuit Court of McHenry County allowing the complainant's claim of \$7,643.62 should be affirmed, but the decree allowing interest from the 12th ~~day~~ of May, 1930, said interest amounting to \$1308.12, is erroneous and the same should not have been allowed. The decree of the Circuit Court of McHenry County is hereby reversed and the case remanded with directions to enter a decree in conformity^{with} this opinion. The costs to be divided equally between appellee and appellant.

Reversed and remanded with directions.

Robert estate. The stipulation shows that the money was received from the estate was withdrawn from the bank within a short time. The bank was not guilty of any fraud, but had retained the money under a claim that it is entitled to do so. Under such circumstances as in this case it is our opinion that interest should not have been

allowed on this claim.

The decree of the Circuit Court of Henry County allowing the complainant's claim of \$7,438.88 should be affirmed, but the decree

allowing interest from the 12th day of May, 1923, said interest amounting to \$1308.12, is erroneous and the same should not have been allowed. The decree of the Circuit Court of Henry County

is hereby reversed and the case remanded with directions to enter

a decree in conformity ^{with} this opinion. The costs to be divided

equally between appellee and appellant.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8672

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 610¹

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
May Term, A.D. 1933.

The People of the State of
Illinois, ex rel Anthony
Zeimis,

Appellee,

Appeal from Circuit Court
Will County.

vs.

Frank G. Gospodaric,
Appellant.

WOLFE--P.J.

The appellee filed a petition for a writ of mandamus in the Circuit Court of Will County on August 24, 1932. In the petition he represented that he is a qualified elector of the village of Rockdale in Will County, Illinois; that the said village is incorporated under the City and Village Acts of 1872; that at a regular meeting of the trustees held on May 23, 1932 he was by said Board duly appointed village treasurer to succeed the respondent Frank J. Gospodaric; that he qualified as such treasurer by filing his bond, and said bond was approved by said village Board; that since his appointment as village treasurer he has acted in that capacity and performed the duties as such treasurer; that he has made demand upon said Gospodaric to turn over the books, records, papers, vouchers and all things pertaining to said office of village treasurer to said Zeimis, but, that said Gospodaric has refused to do so, thereby preventing relator's proper administration of the office of village treasurer. The petition prayed for a Writ of Mandamus, direct to Gospodaric, commanding him to turn over all books, records, etc., in his possession to said Zeimis.

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A.D. 1933.

The People of the State of
Illinois, ex rel Anthony
Zelmia,

Appellant from Circuit Court
Will County.

Appellee,
vs.
Frank G. Gospodarko,
Appellant.

WOLFE--P.1.

The appellee filed a petition for a writ of mandamus in the Circuit Court of Will County on August 24, 1932. In the petition he represented that he is a qualified elector of the village of Rockdale in Will County, Illinois; that the said village is incorporated under the City and Village Acts of 1872; that at a regular meeting of the trustees held on May 27, 1932 he was by said board duly appointed village treasurer to succeed the respondent Frank J. Gospodarko; that he qualified as such treasurer by filing his bond, and said bond was approved by said village board; that since his appointment as village treasurer he has acted in that capacity and performed the duties as such treasurer; that he has made demand upon said Gospodarko to turn over the books, records, papers, vouchers and all things pertaining to said office of village treasurer to said Zelmia, but, that said Gospodarko has refused to do so, thereby preventing Zelmia's proper administration of the office of village treasurer. The petition prayed for a writ of mandamus, direct to Gospodarko, commanding him to turn over all books, records, etc., in his possession to said Zelmia.

The said Gospodario filed his answer admitting relator's qualifications and the incorporation of Rockdale under ^{the} City and Village Act. The answer denied that the relator was ever appointed Village treasurer of Rockdale, or that he qualified or acted as such, and further states that the Board of Trustees of the Village of Rockdale on May 23, 1932 at a regular meeting appointed Gospodario as Village Treasurer, but saysthat after an adjournment of a regular meeting on May 23, 1932, a group of members held an informal and illegal meeting and then and there attempted to appoint Zeimis village Treasurer, but that their action was void and conferred no authority on relator to act as Village Treasurer. The answer alleges that the respondent Gospodario was regularly appointed Village Treasurer in May 1931 and has never been discharged from such office and was at the commencement of this proceeding the legal treasurer of said village. The answer admits that the petitioner made demands upon the respondent to turn over to him the books, records, etc., pertaining to the office of Village Treasurer and that the respondent refused to do so.

After numerous motions by the respective parties were made and ruled upon the case was submitted to the trial court without a jury. The court heard the evidence and found the issues in favor of the relator and ordered the issuance of a Writ of Mandamus commanding the respondent to turn over the books, records, papers etc., to the relator Zeimis. The respondent excepted to this order and has brought the case to this court on appeal for review.

An examination of the record and minutes of the Board of Trustees of said village discloses that said appellee was appointed treasurer and that he qualified by filing his bond and that said bond was approved by said Board of Trustees as alleged by the relator in his petition. The records disclose the yea and nay vote. Regard-

The said Gopabandhu filed his answer admitting the
the
qualifications and the incorporation of Bockale (Bokale) and
Village Act. The answer denied that the relator was ever appointed
Village treasurer of Bockale, or that he qualified or acted as
such, and further states that the Board of Trustees of the Village
of Bockale on May 23, 1931 at a regular meeting appointed Gopabandhu
as Village Treasurer, but as yet after an adjournment of a regular
meeting on May 24, 1931, a group of members held an informal and
illegal meeting and then and there attempted to appoint Bockale
Treasurer, but that their action was void and conferred no authority
on relator to act as Village Treasurer. The answer alleges that the
respondent Gopabandhu was regularly appointed Village Treasurer in
May 1931 and has never been discharged from such office and was at
the commencement on this proceeding the legal treasurer of said
village. The answer admits that the petitioner made demands upon
the respondent to turn over to him the books, records, etc., but
failing to do so the relator and the respondent
refused to do so.

After numerous motions of the respondent were made and
ruled upon the case was submitted to the trial court without a jury.
The court heard the evidence and found the issues in favor of the
relator and ordered the issuance of a writ of habeas corpus compelling
the respondent to turn over the books, records, papers, etc., to the
relator. The respondent excepted to this order and has
brought the case to this court on appeal for review.

In examination of the record and minutes of the Board of
Trustees of said village disclosed that said trustee was appointed
Treasurer and that he qualified by filing his bond and that said
bond was approved by said Board of Trustees as alleged by the relator
in his petition. The records disclose the fact and nature of the

ing the above facts there is nothing to show that this does not reflect a true record of the acts and doings of said Board.

Records of Boards of Trustee are not required to be kept in any particular manner. (People vs. Strohms, 285 Ill. 580.) If the record is such that it truly represents the acts and doings of the Board of Trustees it is sufficient to establish the facts as therein set forth.

We are of the opinion that the trial court properly found that the petitioner Zeimis had been duly appointed treasurer of the Village of Rockdale and properly awarded the Writ of Mandamus to compel the appellant to surrender the records, books, papers and other things pertaining to said office to the appellee Zeimis. The judgment of the Circuit Court of Will County should be and is hereby affirmed.

Judgment affirmed.

in the above facts there is nothing to show that the Board has
reflected a true record of the acts and doings of said Board.

Records of Board of Trustees are not required to be kept in
any particular manner. (People vs. Stroess, 285 Ill. 550.) If
the record is shown that it truly represents the acts and doings
of the Board of Trustees it is sufficient to establish the facts
as therein set forth.

We are of the opinion that the Board of Trustees properly found
that the petitioner herein had been duly appointed treasurer of
the Village of Rockdale and properly received the title of treasurer
to compel the applicant to surrender the records, books, papers
and other things pertaining to said office to the appellee herein.
The judgment of the Circuit Court of this County should be and
is hereby affirmed.

John J. Rittner.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8644

787

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 610²

BE IT REMEMBERED, that afterwards, to-wit: On
SET 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D.1933.

Sall Brothers Company, a
Corporation,

Defendant in error

vs.

Error to the Circuit

Jacob Pekarsky, Jacob Rubin
and Abe Pekarsky,

Court of Winnebago County,

(Jacob Pekarsky,

Plaintiff in error.

DOVE-J.

This is an action of Trespass on the Case, brought by Sall Brothers Company, a corporation, against Jacob Rubin, Abe Pekarsky and Jacob Pekarsky. The declaration consists of one count and alleges that Jacob Pekarsky and Jacob Rubin were engaged in the business of buying, accumulating and selling junk, under the name of American Iron & Metal Company, and that the said Jacob Rubin and Jacob Pekarsky, conspired together and with the defendant Abe Pekarsky, and with divers unknown other persons, that said divers unknown persons would procure junk by stealing the same and deliver possession thereof to the said Abe Pekarsky, Jacob Pekarsky and Jacob Rubin. The declaration further alleged that the defendant in error was the owner of a large number of castings and patterns made of aluminum and other materials and metals and that these patterns and castings were so marked that the plaintiff could identify them.

The declaration then alleges that in pursuance of and in carrying out this conspiracy, the unknown persons entered the

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D. 1933.

Sell Brothers Company, a
Corporation,

Defendant in error

Error to the Circuit

vs.

Jacob Pekarsky, Jacob Rubin
and Abe Pekarsky,

(Jacob Pekarsky,

Plaintiff in error.

DOVE-7.

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Brothers Company, a corporation, against Jacob Rubin, Abe Pekarsky

and Jacob Pekarsky. The declaration consists of one count and

alleges that Jacob Pekarsky and Jacob Rubin were engaged in the

business of buying, accumulating and selling junk, under the name

of American Iron & Metal Company, and that the said Jacob Rubin

and Jacob Pekarsky, conspired together and with the defendant

Abe Pekarsky, and with diverse unknown other persons, that said

diverse unknown persons would procure junk by stealing the same

and deliver possession thereof to the said Abe Pekarsky, Jacob

Pekarsky and Jacob Rubin. The declaration further alleges that

the defendant in error was the owner of a large number of cast-

ings and patterns made of aluminum and other materials and metals

and that these patterns and castings were so marked that the plain-

tiff could identify them.

The declaration then alleges that in pursuance of and in

carrying out this conspiracy, the unknown persons invited the

premises of defendant in error without its knowledge or consent, and took its patterns and castings and delivered them to the said Abe Pekarsky, Jacob Rubin and Jacob Pekarsky, who paid the unknown persons for so doing, and that as a result thereof the defendants obtain property of the plaintiff to the value of \$5000.00. Separate attorneys appeared for and represented each defendant and file on behalf of his respective client a plea of the general issue. A trial was had, resulting in a verdict finding Jacob Pekarsky and Abe Pekarsky guilty, and assessing the plaintiff's damages at the sum of \$3,600.00. Jacob Rubin was found not guilty. The court, after overruling motions for a new trial and in arrest of judgment, entered judgment upon the verdict and to reverse this judgment, plaintiff in error, Jacob Pekarsky has sued out this writ of error.

The evidence discloses that the defendant in error owned a large foundry in Rockford and a warehouse nearby, in which it had stored a considerable quantity of aluminum patterns and castings. In the latter part of 1930 or in January 1931 many of these were stolen by Raymond Rollins, Francis Mitchell and Wm. Johnson, boys about 17 or 18 years of age. Each of these boys were witnesses on behalf of defendant in error, and from their testimony it appears that at the suggestion and solicitation of Abe Pekarsky, these boys not only stole patterns and castings from defendant in error, but also committed numerous other thefts from other machine and manufacturing concerns.

The evidence further discloses that Rollins, Mitchell and Johnson entered the warehouse of defendant in error on several occasions, usually on Saturdays in the late afternoon or early evening, and after stealing the castings and patterns put them in bur-lap gunny sacks and carried them to a lot back of the National Furniture Company and hid the sacks back of some lumber piles. Abe Pekarsky would come out there in his truck after dark and with the help of the boys would load the junk upon the truck, and they would then all go to Abe's home, where it was weighed on scales

premises of defendant in error without its knowledge or consent, and took its patterns and castings and delivered them to the defendant. The defendant, Jacob Rubin and Jacob Pekar, who were the persons for so doing, and that as a result thereof the defendant obtained property of the plaintiff to the value of \$500.00. Separate attorneys appeared for and represented each defendant and the defendant of his respective client a plea of the general issue. A trial was had, resulting in a verdict finding Jacob Pekar and the defendant guilty, and assessing the plaintiff's damages at the sum of \$3,500.00. Jacob Rubin was found not guilty. The court, after overruling motions for a new trial and in arrest of judgment, entered judgment upon the verdict and to reverse this judgment, plaintiff in error, Jacob Pekar, has sued out a writ of error. The evidence discloses that the defendant in error owned a large foundry in Brooklyn and a warehouse nearby, in which it had stored a considerable quantity of aluminum patterns and castings. In the latter part of 1940 or in January 1941 any of these were stolen by Raymond Hollins, Franklin Mitchell and Mr. Johnson, boys about 14 or 15 years of age. None of these boys were witnesses on behalf of defendant in error, and from their testimony it appears that at the suggestion and solicitation of the defendant, these boys not only stole patterns and castings from defendant in error, but also committed numerous other thefts from other machine and manufacturing concerns. The evidence further discloses that Hollins, Mitchell and Johnson entered the warehouse of defendant in error on several occasions, namely on Saturdays in the late afternoon or early evening, and after stealing the castings and patterns put them in large gunny sacks and carried them to a lot back of the defendant's furniture company and hid the sacks back of some lumber piles. The defendant would come out there in his truck after dark and with the help of the boys would load the truck upon the street, and they would then all go to the defendant's home, where it was well known

which were on the back porch, after which the boys would carry it back of the garage, which was about twenty or thirty feet from the house on the same lot, and it was left there in the sacks with other junk which Abe had accumulated, and which occupied a space of five or ten feet square and about one foot high, there being one thousand or fifteen hundred pounds of junk there altogether. Abe would then pay the boys junk prices therefor. According to Rollins, Mitchell and Johnson the patterns and castings stolen from defendant in error were not broken up when sold to Abe. One night later and while some of this property was on the pile of junk back of the garage where the boys had placed it after they sold it to Abe, they took some of it, with other property, and re-sold it to Jake Rubin, who paid Johnson \$4.80 therefor, by giving a check for that amount, the check being signed "American Iron and Metal Co. J. Rubin."

The evidence further discloses that Jacob Rubin was engaged in the junk business and a partner of Jacob Pekarsky, and they had a place of business which they conducted under the name of the "American Iron and Metal Co." Jacob Pekarsky is the father of Abe Pekarsky. Abe never bought any junk for his father or for Rubin and never sold them any, and never frequented their place of business. While Abe slept at the home of his father and mother, he had no business or social relations with his father, and their feelings toward one another were not friendly or pleasant. They never ate their meals together, and for more than a year previous to the time Abe purchased these patterns and castings from Rollins, Mitchell and Johnson, neither the father or son had addressed a word to the other or had anything to do with each other. Abe was twenty years of age when the property of defendant in error was stolen, and had bought and sold junk in a limited way for several years. He had no junk yard or established place of business, other than the home of his father. Some time prior to the time that Rubin and the senior Pekarsky had become associated in business,

which were on the back porch, after which the boys would carry it back of the garage, which was about twenty or thirty feet from the house on the same lot, and it was left there in the back with other junk which Abe had accumulated, and which occupied a space of five or ten feet square and about one foot high, there being one thousand or fifteen hundred pounds of junk there altogether. Abe would then pay the boys junk prices therefor. According to Rollins, Mitchell and Johnson the patterns and castings stolen from defendant in error were not broken up when sold to Abe. One night later and while some of this property was on the pile of junk back of the garage where the boys had placed it after they sold it to Abe, they took some of it, with other property, and re-sold it to Jake Rubin, who paid Johnson \$4.00 therefor, by giving a check for that amount, the check being signed "American Iron and Metal Co. J. Rubin."

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Rubin had sold Abe a model T Ford Truck, which Abe kept at Monks' garage a block and one-half from where he lived.

Abe Pekarsky testified that it was his custom to sell the junk which he purchased, usually on the same day, to Joseph Behr and Sons. He denied that he suggested to or solicited Rollins, Mitchell and Johnson to steal, but said his first meeting with them was while he was getting some junk in the neighborhood of their home. These boys, according to Abe's testimony, asked him to come over and get some lead junk which they had to sell, which he did and later he purchased from them on several Saturday evenings, about eight o'clock after dark, the patterns and casting which had been stolen from defendant in error, but contradicted the boys by testifying that when he bought them they were broken up. He was able to tell that the material of these patterns was aluminum after it was shown to him in the court room, but he didn't know that the broken pieces could make a pattern of any kind, and while the metals looked new to him and bore no marks which would indicate that they were old or discarded, he made no inquiry as to the place from whence they came. The day after his arrest for buying stolen property, he forthwith removed them from his junk pile to an isolated place on School Street. While Abe testified that he sometimes attended the church of his father, his religion could hardly be said to be orthodox. His sabbath ended at sundown on Saturday and he therefore scrupulously waited until after dark and then he would take his truck, go to a lonely isolated spot, meet these boys and purchase junk from them. He did not, of course, inquire from whence the aluminum patterns and castings came, and if he entertained a suspicion that these valuable metals might have been stolen, that suspicion vanished at the same time the sun disappeared from view. His testimony is unconvincing and as to him the jury were warranted in finding him guilty.

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Jacob Pekarsky testified that he had no connection with his son's business, and his son had no connection with his, that he knew his son was storing some junk in the back yard of his home, surrounded by grapevines, bushes and trees, but he paid no attention to it and never went back and looked at it, never touched it, never hauled any of it away, and was never present when Abe bought or sold any and had not spoken to him for a year and a half or two years prior to his arrest. That after he was arrested, he spoke to him, advised him and arranged for his bond. That he had met Ray Rollins at the time Ray's mother had sold him, Jacob, some scrap iron, junk and rags, but he paid his mother therefor and never had any business with Ray and never told Ray or anyone to get junk and he would buy it from him, and did not know Mitchell or Johnson.

Rollins, Mitchell and Johnson each testified that Jacob Pekarsky never had any conversation with them about procuring junk for him, that Jacob knew nothing about the wrongful taking by them of any property either from defendant in error or from any one else, and that Jacob was not at home on any of the occasions when they were there and had their transactions with Abe. Rollins and Mitchell both testified, however, that they had sold Jacob some melted lead and patterns which had belonged to defendant in error and some brass and stolen copper, and when asked how many times Jacob had bought junk from Rollins, this witness replied, every time we called him up and that Jacob did tell them he would pay more than his son, and requested them to save their junk for him.

The declaration in this case alleges that Jacob Rubin and Jacob Pekarsky conspired with Abe Pekarsky and with divers unknown persons by the terms of which the unknown persons were to steal property and to deliver possession thereof to Abe Pekarsky and to Jacob Rubin and Jacob Pekarsky. Conspiracy is defined as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose. 5 R.C.L. 1061.

Jacob Pekarsky testified that he had no conversation with his son's mistress, and his son had no conversation with her, that he knew his son was storing some junk in the back yard of his home, surrounded by grapevines, bushes and trees, but he paid no attention to it and never went back and looked at it, never touched it, never hauled any of it away, and was never present when Abe bought or sold any and had not spoken to him for a year and a half or two years prior to his arrest. That after he was arrested, he spoke to him, advised him and arranged for his bond. That he had met Ray Rollins at the time Ray's mother had sold him, Jacob, some scrap iron, junk and rags, but he paid his mother money and never had any business with Ray and never told Ray or anyone to get junk and he would pay it from him, and did not know Mitchell or Johnson.

Rollins, Mitchell and Johnson each testified that Jacob Pekarsky never had any conversation with them about procuring junk for him, that Jacob knew nothing about the wrongful taking of them of any property either from defendant in error or from any one else, and that Jacob was not at home on any of the occasions when they were there and had their transactions with Abe. Rollins and Mitchell both testified, however, that they had sold Jacob some melted lead and patterns which had belonged to defendant in error and some brass and stolen copper, and when asked how many times Jacob had bought junk from Rollins, this witness replied, every time we called him up and that Jacob did tell them he would pay more than his own, and requested them to save their junk for him.

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Bouvier's Law Dictionary. Conspiracy is an unlawful combination or agreement between two or more persons to do an act unlawful in itself or a lawful act by unlawful means. *Breitenberger v. Schmidt*, 38 Ill. App. 168. It may be proved not only by direct evidence but as well by inference from conduct which discloses a common design on the part of those charged to act together in pursuance of the common criminal purpose. It is not necessary that the conspirators should have met together. If one concurs in a conspiracy after it is formed, no agreement for such concurrence is necessary to establish his guilt. *People v. Looney*, 324 Ill. 375; *People v. Walczak*, 315 Ill. 49.

In this case, as in other cases, circumstantial evidence is competent evidence, but we have read all of the testimony with care and there is no sufficient evidence in this record from which we can say that the charges of conspiracy, so far as Jacob Pekarsky is concerned, can be said to have been established. The evidence warranted the jury in finding that Abe Pekarsky did make an unlawful agreement with Rollins, Mitchell, Johnson and perhaps Malstrom, the result of which was that some of these boys stole the property of defendant in error and others, and thereafter Abe Pekarsky bought it from them, knowing it had been stolen and knowing that it was stolen for the purpose of selling it to him, but there is nothing from which it can be reasonably inferred that Jacob was a party to any such arrangement, nor are any or all of the several facts to which reference is hereaftermade, together with all the other facts and circumstances as shown by the evidence in this case, sufficient in our opinion, to infer that there was any conspiracy between Jacob, Abe and the actual thieves.

Defendant in error, however, insists that seldom, if ever, can a conspiracy be proven by witnesses who testify to conversations which make up a conspiracy, but that a conspiracy or an agreement to do a wrongful act must generally be established by circumstances and directs our attention to certain evidence in this record from

Bouvier's Law Dictionary. Conspiracy is an unlawful combination or agreement between two or more persons to do an act unlawful in itself or a lawful act by unlawful means. *Bristerberger v. Brister*, 39 Ill. App. 108. It may be proved not only by direct evidence but as well by inference from contact which discloses a common design on the part of those charged to act together in pursuance of the common criminal purpose. It is not necessary that the conspirators should have met together. If one concurs in a conspiracy after it is formed, no agreement for such concurrence is necessary to establish his guilt. *People v. Downey*, 384 Ill. 375; *People v. Walczak*, 315 Ill. 49.

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which the existence of the conspiracy must, so it is argued, necessarily be inferred. And counsel dwell in their argument upon the fact first, that Abe was a minor son of plaintiff in error; second, Jacob and his son slept and ate under the same roof and attended the same church; third, the stolen property was weighed on the porch of the house under the roof of which Jacob and Abe slept and ate their meals; fourth, Abe had a pile of junk back of the garage about twenty feet away from the back door of this home; fifth, Jacob bought some stolen property and junk from these boys, taking his truck for that purpose to a vacant lot where the junk had been collected; sixth, Jacob after his son's arrest, advised with his son and arranged for bail; and seventh, the improbable character of the unusual evidence that Jacob and his son had no speaking acquaintance for months previous to the time these patterns and castings were stolen.

It is true that Abe lacked six months of being twenty-one years of age at the time this agreement was being carried out, and it is true that he was living at the home of his father and ate and slept there and sometimes attended the same church as his father. It is true also that this stolen property was brought to his home and weighed there and then thrown on a pile at the back of the garage, but these facts, together with the further fact that Jacob did speak to his son after his arrest and did arrange for bail for him and conceding that he may have bought in the daytime some stolen property and junk from some of these boys and hauled it from a vacant lot in his truck are not sufficient, in our opinion, to warrant the jury in finding that the allegations of the declaration had been established by that degree of proof which the law requires in a case of this character. It is unusual for a father and son to live under the same roof and

which the existence of the conspiracy must, as it is argued, necessarily be inferred. And counsel dwell in their argument upon the fact first, that Ake was neither son or daughter in error; second, Jacob and his son slept and ate under the same roof and attended the same church; third, the stolen property was weighed on the porch of the house under the roof of which Jacob and the eldest and ate their meals; fourth, Ake had a bill of lading back of the garage about twenty feet away from the back door of this house; fifth, Jacob bought some stolen property and junk from these boys, taking his trail for that purpose to a vacant lot where the junk had been collected; sixth, Jacob after his son's arrest, advised with his son and arranged for bail; and seventh, the probable character of the unusual evidence that Jacob and his son had in seeking acquittances for the same previous to the time these patterns and castings were stolen. It is true that Ake looked six months of being twenty-one years of age at the time this argument was being carried out, and it is true that he was living at the home of his father and ate and slept there and sometimes attended the same church as the father. It is true also that this stolen property was brought to his home and weighed there and then thrown on a pile at the back of the garage, but these facts, together with the father's fact that Jacob did speak to his son after his arrest and did arrange for bail for him and conceding that he may have bought it the day he came stolen property and junk from some of these boys and held it in a vacant lot in his yard are not sufficient, in our opinion, to warrant our jury in finding that the allegations of the declaration had been established by such degree of proof with the law requires in cases of this character. It is a natural for a father and son to live under the same roof and

not speak, but all the evidence offered by defendant in error, as well as the evidence of the witnesses for plaintiff in error, is to the effect that such is a fact, and if it is, no unlawful agreement was orally entered into between these parties.

In our opinion the verdict of the jury is manifestly against the weight of the evidence, insofar as it found plaintiff in error guilty and the trial court erred in rendering judgment thereon. It is unnecessary therefore for us to consider any of the other assignments of error. The judgment of the Circuit Court of Winnebago County is reversed and the cause remanded.

Reversed and remanded.

not speak, but if the witness offered to testify in this way as well as the evidence of the witness that he did not speak, it is to the effect that even if it is a fact, and if it is a fact, an agreement was orally entered into between these parties. In our opinion the verdict of the jury is sufficient against the weight of the evidence, inasmuch as it found that the defendant was guilty and the trial court acted in rendering judgment thereon. It is unnecessary for us to consider any of the other assignments of error. The judgment of the Circuit Court of Winnebago County is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8658

AT A TERM OF THE APPELLATE COURT,

797

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 610³

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1933.

Stella Dombrowsky,

Appellee

vs.

Appeal from the Circuit Court

The Prudential Insurance Company
of America, a corporation,

of Lake County.

Appellant.

DOVE-J.

Stella Dombrowsky, the appellee herein, filed her declaration in assumpsit against the Prudential Insurance Company of America, a corporation, appellant, alleging that appellant, on July 1, 1930, in consideration of the payment of \$60.14 by Fred A. Dombrowsky, issued and delivered to him a policy of life insurance insuring his life in the amount of \$2,000.00, that on August 24, 1930 Fred A. Dombrowsky died, while the said policy was in full force and effect, and while no premium thereon was in default: that on September 19, 1930 appellee notified appellant of the death of the insured and made a demand for payment, which was refused on November 13, 1930, appellant denying liability thereunder. The declaration further alleged that the plaintiff is the widow of the said Fred A. Dombrowsky and the beneficiary under the said policy. Subsequently and on June 17, 1931, appellee filed an additional count containing the same allegations as the original declaration, but charged in addition that appellant disclaimed any liability under said policy, because the first premium was never paid, and by so doing, appellant thereby waived the presentation and filing of proof of death. Attached to this declaration was an affidavit of claim.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
JANUARY TERM, A. D. 1933.

Stella Dombrowsky,

Appellee

vs.

Appeal from the Circuit Court

of Lake County.

The Prudential Insurance Company
of America, a corporation,

Appellant.

DOVE-7.

Stella Dombrowsky, the appellee herein, filed her declaration in assumpsit against the Prudential Insurance Company of America, a corporation, appellant, alleging that appellant, on July 1, 1930, in consideration of the payment of \$50.14 by Fred A. Dombrowsky, issued and delivered to him a policy of life insurance insuring his life in the amount of \$2,000.00, that on August 24, 1930 Fred A. Dombrowsky died, while the said policy was in full force and effect, and while no premium thereon was in default: that on September 19, 1930 appellee notified appellant of the death of the insured and made a demand for payment, which was refused on November 13, 1930, appellant denying liability thereunder. The declaration further alleged that the plaintiff is the widow of the said Fred A. Dombrowsky and the beneficiary under the said policy. Wherefore and in law it is prayed that the plaintiff be awarded the sum of \$2,000.00, with interest thereon from the date of the death of the insured to the date of judgment, and that the costs of this action be awarded to the plaintiff. In support of the foregoing allegations as the original declaration, but omitted in this declaration, the plaintiff has filed an additional count containing the same allegations as the original declaration, but changed in addition that appellant disclaimed any liability under said policy, because the first premium was never paid, and by no doing, appellant thereby waived the presentation and filing of proof of death. Attached to this declaration was an affidavit of claim.

Defendant filed its plea of the general issue, and notice of certain special defenses, together with its affidavit of merits. The notice of special defenses and the affidavit of merits set up the following defenses. First, that the policy in appellee's possession was never delivered to the deceased for the purpose of putting it into effect, but that the insured obtained custody of said policy at his request, without consideration and for the sole and only purpose of inspecting it. Second, that no premium or other consideration was ever given or paid, as a premium, to appellant company or any of its authorized agents for said policy. Third, that appellant never waived any objections it might have to the time or manner of giving notice of death of the insured or the requisite proof of death as required by the policy. Fourth, that appellant has never received nor has the plaintiff ever made due proof of the death of the insured.

From a judgment in favor of appellee and against appellant for \$2231.94 rendered upon a verdict of a jury, the record is brought to this court for review by appeal.

The evidence discloses that on June 28, 1930 the insured signed and delivered an application for a \$2,000.00 insurance policy in the appellant company upon his life, payable to his wife, appellee herein, as his beneficiary. This application recited that no premium had been paid in advance. Appellant issued a thirty-one year endowment policy, upon this application, the policy bearing No. 7019329 and dated July 1, 1930. This policy recited that it was issued in consideration of the application which was made a part of the contract and of the payment of the premium therein provided. The policy stated that the semi-annual premium was \$60.14, payable on the delivery of the policy, the receipt of which was acknowledged. Margaret Haggerty was the soliciting agent for appellant and worked out of its Chicago office. On August 14, 1930 she took this policy and left it with the insured at his office in room #1411, 115 South

Defendant filed its plea of the General Issue, and moved for certain special defenses, together with its affidavits in support thereof. The notice of special defenses and the affidavits of support are as follows: First, that the policy in question was never delivered to the deceased for the purpose of insuring it into effect, but that the insured obtained custody of said policy at his request, without consideration and for the sole and only purpose of inspecting it. Second, that no premium or other consideration was ever given or paid, as a premium, to appellant company or any of its authorized agents for said policy. Third, that appellant never waived any objections it might have to the time or manner of giving notice of death of the insured or the requisite proof of death as required by the policy. Fourth, that appellant has never received any proof of the death of the insured. From a judgment in favor of appellee and against appellant for \$2381.94 rendered upon a verdict of a jury, the record is brought to this court for review by appeal.

The evidence discloses that on June 28, 1930 the insured signed and delivered an application for a \$25,000 insurance policy in the appellant company upon his life, payable to his wife, appellee, as his beneficiary. This application recited that no premium had been paid in advance. Appellant issued a thirty-one year endowment policy, upon this application, the policy bearing No. 7018323 and dated July 1, 1930. This policy recited that it was issued in consideration of the application which was made a part of the contract and of the payment of the premium therein provided. The policy stated that the semi-annual premium was \$60.14, payable on the 1st day of the month, the receipt of which was acknowledged. Garret Hargerty was the assisting agent for appellant and was out of its Chicago office. On August 14, 1930 she took the policy and left it with the insured at his office at 1200 North Dearborn Street.

Michigan Avenue, and received from him the following instrument, viz: "Aug. 14, 1930. Received of Margaret Haggerty policy 7019320 for inspection. Fred A. Dombrowsky". This receipt was written by Margaret Haggerty on the back of one of his blank invoices or letterheads, and Mr. Dombrowsky signed it and delivered it to Mrs. Haggerty at the time Mrs. Haggerty delivered to him the policy upon which this suit is based. Mrs. Haggerty testified that she had called upon the insured at other times to solicit business, but this policy is the only one she ever delivered to him and that he paid her no part of the premium thereon. Lena Edwards testified that she was a sister of Margaret Haggerty and also an agent of appellant, and accompanied her to Mr. Dombrowsky's office at the time this policy was left with the insured, and she corroborates the testimony of her sister to the effect that no premium was paid by Mr. Dombrowsky and that in exchange for the policy the insured executed the receipt. Herman Macharek testified that he was an employee of the insured, who was a custom maker of shoes, and was present several times when Margaret Haggerty was at Dombrowsky's place of business and recalled that about the middle of August 1930 she left a policy of insurance with him, but that Mrs. Edwards was not there upon that occasion, but had been there one time before. He observed Mr. Dombrowsky go to his desk but was unable to relate anything else that occurred. It was proved by the Cashier and manager of appellant's Chicago office that no premium had ever been received by appellant upon this policy.

Appellee testified in her own behalf that one evening around August 14, 1930, her husband showed her this policy and after she examined it, she returned it to her husband and he put it back in his pocket, that ten days thereafter and on August 24, 1930 her husband died, and a day or so thereafter she again saw this policy with another policy issued to insured by appellant at her husband's office on the top of a shelf and with her nephew went to the Chicago office of appellant and received claim blanks which were filled out and she

Nichigan Avenue, and received from him the following statement, to-wit:

"Aug. 14, 1930. Received of Margaret Haggerty, Chicago, Ill., inspection. Wrote A. Domrowsky". This receipt was written up and filed in the file of the Chicago Police Department.

Haggerty on the back of one of his blank invoices or letters to and Mr. Domrowsky signed it and delivered it to Mrs. Haggerty at the time Mrs. Haggerty delivered to him the policy upon which the said invoice was based. Mrs. Haggerty testified that she had called upon the insured at other times to solicit business, but this policy is the only one she ever delivered to him and that he paid her no part of the premium thereon. Lena Edwards testified that she was a sister of Margaret Haggerty and also an agent of applicant, and accompanied her to Mr. Domrowsky's office at the time this policy was left with the insured, and she corroborates the testimony of her sister as to the effect that no premium was paid by Mr. Domrowsky and that the exchange for the policy the insured executed the receipt. Herman Leachman testified that he was an employee of the insured, who was a custom maker of shoes, and was present several times when Margaret Haggerty was at Domrowsky's place of business and recalled that about the middle of August 1930 she left a policy of insurance with him, but that Mrs. Edwards has not thereupon that occasion, but has been there one time before. He observed Mr. Domrowsky go to his desk but was unable to relate anything else that occurred. It was proved by the Cashier and manager of applicant's Chicago office that no premium had ever been received by applicant upon this policy.

Appellee testified in her own behalf that one evening around August 14, 1930, her husband showed her this policy and asked her to examine it, she returned it to her husband and he put it back in his pocket, that ten days thereafter and on August 21, 1930, her husband died, and a day or so thereafter she again saw this policy with another policy issued to insured by appellee at her husband's office on the top of a shelf and with her nephew went to the Chicago office of appellee and received claim blanks which were filled out and the

was present when they were delivered to appellant. Mrs. Deibel, a sister of appellee, corroborates appellee as to seeing the policy around August 14, 1930 in the possession of the insured, and she and Daniel Mielke, a nephew of the insured, both corroborate appellee as to finding it shortly after his death at his place of business with the other policy issued by appellant, and Mr. Mielke corroborated appellee as to going to the office of appellant, securing claim blanks and returning them to Mr. Van Goldman, the manager of appellant's Chicago office. The foregoing is substantially all of the evidence introduced by the parties upon the trial of this cause.

Appellant contends that the first semi-annual premium upon the policy sued on was never paid and that the policy was delivered for inspection only, and never for the purpose of making it effective as a policy of insurance. Appellee insists that inasmuch as the policy acknowledges the receipt of the semi-annual premium, appellant is precluded from showing that this premium was not in fact paid or that the policy was never operative.

The evidence convinces us that this policy was never delivered by appellant to the insured and never accepted by insured as a valid, binding contract of insurance, and therefore the trial court erred in refusing the peremptory instruction tendered by appellant at the close of all the evidence.

There is no dispute as to what occurred at the time the policy came into possession of the insured. He received the policy, so he states over his own signature for one purpose only, and that purpose was for inspection. Within ten days after so receiving it, he died. It was found along with another policy at the place of business where he received it. This other policy was issued by appellant in 1917 and upon which appellant has discharged by payment its liability thereunder. The delivery of the policy in the instant case was not conditional, contingent or dependent upon anything. The evidence is clear, convincing and undenied that in pursuance of an application for insurance, no premium having been paid therefor, appellant issued

was present when they were delivered to appellant, Mr. Daniel, a sister of appellee, corroborates appellee as to seeing the policy around August 14, 1930 in the possession of the insured, and that Daniel likewise, a nephew of the insured, both corroborate appellee as to finding it shortly after his death at his place of business with the other policy issued by appellant, and Mr. Elsie corroborated appellee as to going to the office of appellee, securing claim blanks and returning them to Mr. Van Gohman, the manager of appellee's Chicago office. The foregoing is substantially all of the evidence introduced by the parties upon the trial of this cause.

Appellant contends that the first semi-annual premium upon the policy sued on was never paid and that the policy was delivered for inspection only, and never for the purpose of making it effective as a policy of insurance. Appellee insists that insurance as the policy acknowledges the receipt of the semi-annual premium, appellee is precluded from showing that this premium was not in fact paid and that the policy was never operative.

The evidence convinces us that this policy was never delivered by appellant to the insured and never accepted by insured as a valid, binding contract of insurance, and therefore the trial court erred in refusing the peremptory instruction tendered by appellant at the close of all the evidence.

There is no dispute as to what occurred at the time the policy came into possession of the insured. He received the policy, so he states over his own signature for one purpose only, and that purpose was for inspection. Within ten days after so receiving it, he died. It was found along with another policy at the place of business where he received it. This other policy was issued by appellant in July and upon which appellee has discharged by payment its liability thereunder. The delivery of the policy in the instant case was not conditional, contingent or dependent upon anything. The evidence is clear, convincing and uncontroverted that in payment of its liability for insurance, no premium having been paid hereon, appellant issued

the policy sued on. It was received by the insured, not as a binding contract of insurance, but for inspection, and examination, and "while it is true" as we said in our former opinion *Dombrowsky v. Prudential Insurance Co.*, 267 Ill. App. 628 "that possession of a policy of insurance by the applicant raises a presumption that the policy has been delivered and accepted, yet such presumption may be rebutted by showing that such applicant was permitted to take the policy merely for the purpose of examining it and determining, after such examination, whether or not he would accept it. *Richardson v. Northwestern Mutual Life Ins. Co.*, 143 Ill. App. 279; *Equitable Life Assurance Co. v. Mueller*, 99 Ill. App. 460; *N. Y. Life Ins. Co. v. Easton*, 69 Ill. App. 479. Possession of a contract by the party seeking to enforce it is presumptive evidence of its delivery, but is not conclusive, and evidence may be admitted to prove fraud in obtaining possession or that the contract was in effect never delivered; *Kilcoin v. Ortell*, 302 Ill. 531.

In *Jordan v. Davis*, 108 Ill. 336 it was said: "Delivery of a written contract is indispensable to its binding effect, and such delivery is not conclusively proved by showing the placing of the paper by the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently."

The intention, of course, is gathered from what is said and done at and before the time the contracting parties place the instrument out of the hands of one into the hands of another, and while the intention is a question of fact, yet in the instant case the evidence is uncontradicted as to the purpose for which the policy came into the hands of the assured.

The judgment of the Circuit Court is reversed with a finding

the policy sued on. It was received by the insured, but as a result of the contract of insurance, but for inspection, and examination, and while it is true "as we said in our former opinion" that the Prudential Insurance Co., 267 Ill. App. 438 "that possession of a policy of insurance by the applicant raises a presumption that the policy has been delivered and accepted, yet such presumption may be rebutted by showing that such applicant was permitted to take the policy merely for the purpose of examining it and determining, after such examination, whether or not he would accept it. Richardson v. Northwestern Mutual Life Ins. Co., 178 Ill. App. 279; Equitable Life Assurance Co. v. Mueller, 98 Ill. App. 450; A. Y. Life Ins. Co. v. Easton, 98 Ill. App. 479. Possession of a contract by a party seeking to enforce it is presumptive evidence of its delivery, but is not conclusive, and evidence may be admitted to prove that in obtaining possession or that the contract was in effect never delivered; Kilcoin v. Ottell, 302 Ill. 831.

In Jordan v. Davis, 103 Ill. 358 it was said: "Delivery of a written contract is indispensable to its binding effect, and even delivery is not conclusively proved by a showing the filing of the paper by the alleged contracting party in the hands of the other. Delivery is a question of intent, and it depends whether the parties at the time meant it to be a delivery to take effect presently." The intention, of course, is gathered from what is said and done at and before the time the contracting parties place the instrument out of the hands of one into the hands of another, and while the intention is a question of fact, yet in the instant case the evidence is uncontradicted as to the purpose for which the policy came into the hands of the assured.

The judgment of the Circuit Court is reversed and a new trial granted.

of fact. .

Judgment reversed.

The Clerk will insert in the judgment the following:

"The Court finds that the policy of insurance involved in this proceeding was delivered for the purpose of inspection only, and was never intended by the parties thereto as a valid binding contract of insurance and there can be no recovery thereon."

Admittedly,

"The Court will insert in the judgment the following:
"The Court finds that the policy of insurance involved in this
proceeding was delivered for the purpose of inspection only, and
was never intended by the parties thereto as a valid binding
contract of insurance and there can be no recovery thereon."

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



8667

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 610⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D.1933

Beaver Drainage District No. Three,
in the County of Iroquois and State
of Illinois,

Appellee

Appeal from the Circuit
Court of Iroquois County.

vs.

Big Beaver Drainage and Levee Dis-
trict of the County of Iroquois and
State of Illinois,

Appellant.

DOVE - J.

In this case appellee filed in the Circuit Court of Iroquois County its petition for mandamus, alleging that Beaver Drainage District No. Three and Big Beaver Drainage and Levee District, appellant herein, are adjoining districts, organized under the "Farm Drainage", and the "Levee Act" respectively. The petition further alleges that under the Act of June 28, 1913, commonly known as the Adjoining Districts Act, appellee had theretofore filed its verified petition in the County Court of Iroquois County, setting forth that by constructing its main open ditch as provided in the plans, specifications and profiles filed with said petition, that the lands situated in appellant district would be benefited and that the Commissioners of said adjoining districts had failed to enter into a contract settling and adjusting the liability of each of said districts to the other as provided by law. The petition then alleges that the said petition theretofore filed in the County court set forth the profile, map and specifications of the work to

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A.D. 1933

Beaver Drainage District No. Three,
in the County of Iroquois and State
of Illinois,

Appellee

Appeal from the Circuit
Court of Iroquois County.

vs.

Big Beaver Drainage and Levee Dis-
trict of the County of Iroquois and
State of Illinois,

Appellant.

DOVE - J.

In this case appellee filed in the Circuit Court of Iroquois County its petition for mandamus, alleging that Beaver Drainage District No. Three and Big Beaver Drainage and Levee District, appellant herein, are adjoining districts, organized under the "Farm Drainage", and the "Levee Act" respectively. The petition further alleges that under the Act of June 29, 1915, commonly known as the Adjoining Districts Act, appellee had theretofore filed its verified petition in the County Court of Iroquois County, setting forth that by constructing its main open ditch as provided in the plans, specifications and profiles filed with said petition, that the lands situated in appellant district would be benefited and that the Commissioners of said adjoining districts had failed to enter into a contract settling and adjusting the liability of each of said districts to the other as provided by law. The petition then alleges that the said petition theretofore filed in the County Court set forth the profile, map and specifications of the work as

be done, and its estimated cost, and that the County Court, on March 13, 1931, rendered judgment in favor of appellee and against appellant for \$10,000.00 and costs.

The petition for mandamus then alleged the duty of the Commissioners of appellant to pay the judgment out of the funds of the district, if any, lawfully applicable to that purpose, otherwise to levy an assessment against the lands of the district for that purpose, and charged that appellee, on April 11, 1932, caused a written demand to be served on appellant to pay the judgment, with interest, or if no funds were available, to levy an assessment against the lands of the district, but the Commissioners refused either to pay or levy the assessment. The petition prays for a writ of mandamus directed against appellant district and its Commissioners, commanding it and them to either pay the judgment and interest or to levy an assessment as provided by law.

To this petition appellant filed five pleas to which demurrers were sustained to all except the fourth. To the fourth plea appellee filed its replication, to which a demurrer was overruled, and appellant elected to stand by its pleas and by its demurrer to appellee's replication, and the court awarded a peremptory writ of mandamus, as prayed for. From this judgment an appeal has been perfected to this court.

The first plea of appellant admits the recovery by appellee of the \$10,000.00 judgment in the suit for contribution against appellant, for appellant's share of making an improvement to the main outlet ditch of appellee, the estimated cost of the improvement to which was \$51,000.00. This plea alleges that appellee is estopped from obtaining the relief prayed for because its Commissioners classified and made an assessment upon the lands in its district and in so doing included about four hundred acres of land which were within the boundaries of both districts. The plea then alleges that said assessment was confirmed, duly filed for record and became a lien upon the said four hundred acres of overlapping lands,

be done, and its estimated cost, and that the County Court, on March 13, 1937, rendered judgment in favor of appellee and assessed appellant for \$10,000.00 and costs.

The petition for mandamus then alleged that the duty of the commissioners of appellee to pay the judgment out of the funds of the district, if any, lawfully applicable to that purpose, otherwise to levy an assessment against the lands of the district for that purpose, and charged that appellee, on April 11, 1937, caused a written demand to be served on appellant to pay the judgment, with interest, or if no funds were available, to levy an assessment against the lands of the district, but the commissioners refused either to pay or levy the assessment. The petition prayed for a writ of mandamus directed against appellee district and its commissioners, commanding it and them to either pay the judgment and interest or to levy an assessment as provided by law.

To this petition appellant filed five pleas to which answers were answered to all except the fourth. To the fourth plea appellee filed its replication, to which a rejoinder was averred, and appellee elected to stand by its plea and by its replication and its answer, and the court entered a peremptory writ of mandamus, as prayed for. From this judgment an appeal was taken, perfected to this court.

The first plea of appellant admits the recovery by appellee of the \$10,000.00 judgment in the suit for contribution against appellee, for appellee's share of making an improvement to the main outlet of the district, and the estimated cost of the improvement to which was \$10,000.00. This plea alleges that appellee is estopped from obtaining the relief prayed for because its commissioners classified and made an assessment upon the lands in the district and in so doing included about four hundred acres of land within the boundaries of four districts. The plea then alleges that said assessment was confirmed, July 1, 1937, and that came a lien upon the said four hundred acres of overlapping lands,

and avers that the sum so assessed against said four hundred acres amounts to \$2092.45, and as appellant had no funds to pay said judgment, it could not spread a just assessment without including the overlapping lands, and if it did so, the result would be that the owners of said overlapping lands would be compelled to pay a disproportionate share of the cost of the improvement.

The second plea of appellant sets up the assessment of the overlapping lands by appellee, as set forth in the first plea, and alleges that appellee refused to credit its judgment with the said sum of \$2092.45, and for that reason insists that it should be relieved from the payment of any interest upon the \$10,000.00 judgment.

The third plea sets up an estoppel because it is alleged that the judgment was based upon an estimated cost of \$97,876.00 exclusive of the \$10,000.00 judgment and charges that since said judgment was rendered, appellant is informed and believes that contracts for all of said work in the district have been let by appellee for \$42,000.00, and the work has been completed and accepted. This plea then avers that said sum of \$42,000.00, after adding thereto the court costs, commissioners', engineers' and attorney fees, estimated at \$9396.05, leaves a balance of \$45,000.00 not required for the doing of said work, which amount should be rebated by the Commissioners between the land owners in appellee district and appellant.

The fourth plea sets out that the judgment recovered by appellee was the proportionate share of appellant of a system of drainage estimated to cost \$97,876.00, that after the judgment was recovered and before the work was done, appellee changed the plans, profiles, specifications and estimate of cost so that the system was completed was not the system upon which the judgment was based, and such acts constitute a fraud upon appellant and appellee is thereby estopped from collecting its judgment.

and avers that the sum so assessed against said land would amount to \$2092.45, and as appellant has no claim to any said land, it could not recover a just assessment without including the overlapping lands, and if it did so, the result would be that the owners of said overlapping lands would be compelled to pay a disproportionate share of the cost of the improvement.

The second phase of appellant's case in the assessment of the overlapping lands by appellee, as set forth in the first phase, and alleges that appellee refused to credit its judgment with the sum of \$2092.45, and for that reason insists that it should be relieved from the payment of any interest upon the \$10,000.00 judgment.

The third phase sets up an additional defense to its claim that the judgment was based upon an estimated cost of \$7,875.00, exclusive of the \$10,000.00 judgment and charges that since said judgment was rendered, appellee is informed and believes that contracts for all of said work in the district have been let by appellee for \$6,000.00, and the work has been completed and accepted. This phase then avers that said sum of \$6,000.00, after adding thereto the court costs, commissions, engineers' and attorneys' fees, totaling at \$350.00, leaves a balance of \$5,650.00 not required for the doing of said work, which amount should be rebated by the Commissioner to the land owners in appellee's district and appellant.

The fourth phase sets out that the judgment recovered by appellee was the proportionate share of appellant of a system of drainage estimated to cost \$7,875.00, that after the judgment was recovered and before any work was done, appellee changed the plans, utilized specifications and estimate of cost so that the system was completed was not the system upon which the judgment was based, and now seeks to constitute a fraud upon appellee and appellee is entitled to recover from appellee its judgment.

The fifth plea alleges that after the demand was made by appellee upon appellant to pay the judgment, negotiations were entered into between the two districts to settle their difficulties and were pending at the time this suit was instituted.

To the fourth plea appellee filed its replication, in which it set forth the filing of its petition in the County Court to recover for benefits resulting to the lands of appellant district by reason of the proposed construction of the main open ditch of appellee, this plea then avers that thereafter certain changes and additions to the branches and laterals were made, which in no way affected the drainage of any of the lands situated in appellant district, and that in so doing it had not changed the estimated cost of the main ditch of appellee and that the changes made in the laterals and branches did not increase or decrease the amount of water eventually flowing in the main ditch.

The sufficiency of this replication and the several pleas to which a demurrer was sustained are the questions presented to this court for determination.

It is insisted by appellant that the granting of a writ of mandamus is discretionary with the court, and it will not be granted if such action will promote injustice: that in order to pay this judgment, appellant must levy a special assessment on the lands of its district, but appellee has, by its conduct in classifying its lands and spreading an assessment of \$2092.45 upon four hundred acres of lands which also lie in appellant's district, made it impossible for appellant to collect an equitable assessment, but would compel the lands in appellant's district to bear an additional burden of \$2092.45 more than they should, and for this reason appellee has been guilty of a constructive fraud and is estopped from obtaining the relief sought.

The fifth plea alleges that after the decree was made by

appeals upon appellant to pay the judgment, no action was entered into between the two districts to settle their difficulties and were pending at the time this writ was instituted.

To the fourth plea appellee filed its replication, in which it set forth the filing of its petition in the County Court to recover for benefits resulting to the lands of appellant district by reason of the proposed construction of the main open ditch of appellee, this plea then avers that thereafter certain changes and additions to the branches and laterals were made, which in no way affected the drainage of any of the lands situated in appellant district, and that in so doing it had not changed the estimated cost of the main ditch of appellee and that the changes made in the laterals and branches did not increase or decrease the amount of water eventually flowing in the main ditch.

The sufficiency of this replication and the several pleas to which a demurrer was sustained are the questions presented to this court for determination.

It is insisted by appellant that the granting of a writ of

mandamus is discretionary with the court, and it will not be granted if such action will promote injustice; that in order to say this judgment, appellant must have a special assessment on the lands of its district, but appellee avers, by its conduct in classifying its lands and spreading an assessment of \$808.48 upon four hundred acres of lands which also lie in appellant's district, made it impossible for appellant to collect an equitable assessment, but would compel the lands in appellant's district to bear an unequal burden of \$808.48 more than they should, and for this reason appellee has been entitled to a constructive trust and is entitled to relief sought.

The manner by which these four hundred acres of land came to be included in both of these districts does not appear from this record, but it is suggested by counsel for appellee that there is only one way and that is where the owner of land already included in a legally organized district has voluntarily constructed ditches or drains upon his own land and connected these ditches or drains with a ditch of another drainage district. If such is the fact, the owners of these overlapping lands cannot complain that by their own acts their lands are included in two districts. Each district can make assessments only for the benefits conferred on the land by the drainage through the drains of that district. *The People v. Dick*, 276 Ill. 516. The question of benefits to these overlapping lands does not arise upon this record, but if appellant spreads an assessment against these overlapping lands, the owners thereof will certainly be given an opportunity to be heard upon the question of benefits in the event they are not satisfied with their assessments. *North Wichert Drainage District v. Chamberlain* 340 Ill. 644.

In the *North Wichert Drainage District v. Chamberlain*, 340 Ill. 644, it was held that upon the rendition of a judgment against an adjoining drainage district, it thereupon became a legal charge against the district, for which it is the duty of the corporate authorities of the district to provide as in the case of any other legal obligation. Section 13 of the *Adjoining Drainage Districts Act* directs that upon the rendition of a judgment, the Commissioners of the district against which such a judgment is rendered should, without delay, pay said judgment or levy an assessment against the lands of its district in the manner provided by the law under which the district may be organized or operating. Appellant herein, as was the appellant in the *North Wichert Drainage District* case supra, is organized under the *Levee Act*. The manner of levying an assessment is provided for in that Act, and the lands of the district upon which the Commissioners are directed to levy the assessment to pay the judgment are the lands of the district benefited. *North Wichert Drainage District v. Chamberlain*, supra.

The manner in which these two districts were to be included in both of these districts was specified in the record, but it is suggested by counsel for appellant that it is only one way and that it is not the only way of including them in a legally organized district and connected with districts or giving upon his own land and connected with districts with a view of making drainage district. It is not the fact, the owners of these overlapping lands cannot complain that by their own acts their lands are included in two districts. Each district can make assessments only for the benefits conferred on the land by the drainage through the drains of that district. The People v. Dick, 270 Ill. 510. The question of benefits to lands overlapping lands does not arise upon this record, but if appellant desires an assessment against these overlapping lands, the owners thereof will certainly be given an opportunity to be heard upon the question of benefits in the event they are not satisfied with their assessments. North Chicago Drainage District v. Champaign, 260 Ill. 644. In the North Chicago Drainage District v. Champaign, 260 Ill. 644, it was held that upon the rendition of a judgment against an adjoining drainage district, it is not proper to levy an assessment against the district, for when it is the duty of the district authorities of the district to provide as in the case of any other legal obligation. Section 13 of the Adjoining Drainage Districts Act directs that upon the rendition of a judgment, the commissioners of the district against which such a judgment is rendered shall, without delay, pay said judgment or levy an assessment against the lands of its district in the manner provided by the law which authorizes the district may be organized or reorganized. Appellate cases, was the appellant in the North Chicago Drainage District case, is organized under the Drainage Act. The manner of levying an assessment is provided for in that Act, and the lands of the district upon which the Commissioners are directed to levy the assessment to pay the judgment are the lands of the district benefited. North Chicago Drainage District v. Champaign, supra.

We are a loss to understand how it can be seriously contended that appellee perpetrated a fraud upon appellant or has done anything that might work an estoppel. Appellee has done nothing not contemplated by the Statute. The judgment was recovered on March 13, 1931 and the Statute provided that upon the rendition of such a judgment, the Commissioners of appellant should, without delay, pay the same or levy an assessment against the lands of its district. More than a year elapsed and nothing having been done, appellee, on April 11, 1932, served a demand upon the Commissioners of appellant to proceed to do their duty and on June 18, 1932, this action was instituted.

Appellant insists that by the pleadings it is admitted that it exercised jurisdiction over these overlapping lands and appellee by spreading the assessment which it made over these four hundred acres, likewise exercised jurisdiction over the same territory for the same purpose at the same time, which can not be legally done, citing Village of Mount Prospect v. Reese, 342 Ill. 216. It was held in the Mount Prospect case that where a drainage district has assumed jurisdiction for drainage purposes over a village, or a part thereof, where the village had not theretofore assumed such jurisdiction, the village cannot, after such assumption of jurisdiction by the drainage district, assume jurisdiction over the same territory for the same purpose. In the instant case appellee is organized under the Farm Drainage Act and under its provisions appellee was bound to classify its lands and spread an assessment. The pleadings disclose that these four hundred acres were properly in the district of appellee and in classifying these lands and spreading its assessment, appellee complied with a positive statutory duty. Appellant and the owners of these lands knew these provisions of the Statute and are concluded by the judgment rendered by the

We are a loss to understand how it can be arbitrarily com-
tended that appellee perpetrated a fraud upon appellants or has
done anything that might work an estoppel. Appellee has done
nothing not contemplated by the statute. The judgment was re-
covered on March 13, 1931 and the statute provided that upon the
 rendition of such a judgment, the Commissioners of appellant
 should, without delay, pay the same or levy an assessment of like
 the lands of the district. More than a year elapsed and nothing
 having been done, appellee, on April 11, 1932, served a demand
 upon the Commissioners of appellant to proceed to do their duty
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 by the drainage district, assume jurisdiction over the same terri-
 tory for the same purpose. In the instant case appellee is or-
 dered under the Town Drainage Act and under its provisions apprais-
 ed and bound to classify the lands and spread an assessment. The
 pleading discloses that these four hundred acres were property in
 the district of appellee and in classifying these lands and spread-
 ing its assessment, appellee complied with a positive statutory
 duty. Appellant and the owners of these lands have no provisions
 of the Statute and are concluded by the judgment rendered by the

County Court. This judgment, like any other money judgment, under the Statute, bears interest at the rate of 5% from the date of its rendition and no reason has been advanced and we are unable to give a sufficient one why appellant should be favored over any other defendant against whom a judgment is rendered. There is nothing, in our opinion, set up in either the first or second plea of appellant, which can be construed as a constructive fraud upon the rights of appellant or which would estop appellee from successfully maintaining the instant proceeding. It is true that a writ of mandamus will not be awarded where it will result in an injustice, but no injustice will necessarily result if this writ is awarded. In obedience to it, appellant will simply be doing what the Statute said it should have done more than two years ago.

The third plea alleges upon information and belief that appellee let contracts for all of the work in the district for \$42,000.00 and that the work has been completed. That after adding court costs, commissioners', engineers' and attorney fees estimated at \$9396.05, leaves a balance of \$45,000.00 not required for said work, which should be rebated by the Commissioners.

Under the authorities, great strictness is required in a pleading of this character. 38 C. J. 887. And these allegations being only upon information and belief may not be sufficient under the rules of good pleading. Cleary v. Hobbler, 207 Ill. 97. But treating them as sufficient as was done in National Bank of Decatur v. City of Gibson, 261 Ill. App. 190, and notwithstanding the plea does not allege definitely that after the payment of all the debts and obligations of the district there remains a stated unexpended sum of money, we fail to find any provision in the Statute with reference to the statement of assessments

County Court. This judgment, like any other money judgment, under the Statute, bears interest at the rate of 5% from the date of its rendition and no reason has been advanced and we are unable to give a sufficient one why appellant should be favored over any other defendant against whom a judgment is rendered. There is nothing in our opinion, set up in either the first or second plea of appellant, which can be construed as a constructive fraud upon the rights of appellant or which would estop appellee from successfully maintaining the instant proceeding. It is true that a writ of mandamus will not be awarded where it will result in an injustice, but no injustice will necessarily result if this writ is awarded. In obedience to it, appellant will simply be doing what the Statute said it should have done more than two years ago.

The third plea alleges upon information and belief that appellee let contracts for all of the work in the district for \$42,000.00 and that the work has been completed. That after adding court costs, commissioners', engineers' and attorneys' fees estimated at \$396.05, leaves a balance of \$41,603.95 not required for said work, which should be repaid by the Commissioner. Under the authorities, great diligence is required in a pleading of this character. 28 O. J. 887. And these allegations being only upon information and belief may not be sufficient under the rules of good pleading. *Clardy v. Hobbs*, 207 Ill. 97. But treating them as sufficient as was done in *Atwood v. Bank of Decatur v. City of Decatur*, 201 Ill. App. 190, and notwithstanding the plea does not allege definitely that after the payment of all the debts and obligations of the district there remains a stated unexpended sum of money, we fail to find any provision in the Statute with reference to the amount of interest due.

and are clearly of the opinion that the substance of this plea presents no defense to this proceeding. There is no contention that the original estimate was excessive at the time it was made, or at the time of the hearing, or that the estimate was fraud-
ently made, and even though the work may have been done for less than the estimated cost, we do not believe in this proceeding that such fact presents any reason why appellant should not perform its statutory duty. The demurrer was properly sustained to this plea.

The fourth plea alleges that after the judgment was rendered, appellee changed the plans, specifications and estimate of cost so that the improvement, as completed, was not the same improvement upon which the judgment was based. To this plea a length replication was filed, setting forth very fully the proceedings had in the County Court, which disclose that the petition filed therein, upon which appellee recovered its judgment, sought a recovery because the lands in appellant district were benefitted by the construction of the main ditch and therefore should contribute to the cost thereof. This replication then alleges that after the rendition of said judgment, minor changes in certain laterals were made by resolution of the Commissioners, which in no way effected the plans, specifications, profiles, maps or estimated cost of constructing the main ditch, but that said main ditch upon which the judgment for benefits to the lands of appellant district was awarded remained exactly the same as it was prior to the making of said changes. The replication set forth the resolution of the Commissioners, which embraced the engineers' supplementary report and averred that the contract for the construction of the main open ditch was let and it was constructed according to the identical map, plans, profiles, and specifications which were introduced in evidence upon the hearing in the County Court which resulted in the judgment sought to be collected by this proceeding. The replication then averred that the changes in certain laterals, which changes

and are clearly of the opinion that the evidence of this case presents no defense to this proceeding. There is no contention that the original estimate was excessive at the time it was made, or at the time of the hearing, or that the estimate was therein entirely made, and even though the work may have been done for less than the estimated cost, we do not believe in this proceeding that such fact presents any reason why appellant should not perform its statutory duty. The defendant was properly enjoined to this place. The fourth plea alleges that after the judgment was rendered, appellee changed the plans, specifications and estimate of cost so that the improvement, as completed, was not the same improvement next upon which the judgment was based. To this plea a lengthy replication was filed, setting forth very fully the proceedings had in the County Court, which disclose that a petition filed therein, upon which appellee recovered its judgment, sought a recovery because the lands in appellant district were benefited by the construction of the main ditch and therefore should contribute to the cost thereof. This replication then alleges that after the rendition of said judgment, which was in certain lateral were made by resolution of the Commissioners, which in no way affected the plans, specifications, profiles, maps or estimated cost of constructing the main ditch, but that said main ditch upon which the judgment for benefits to the lands of appellant district was awarded remained exactly the same as it was prior to the making of said changes. The replication set forth the resolution of the Commissioners, which embraced the engineers' supplementary report and averred that the contract for the construction of the main open ditch was let and it was constructed according to the original map, plans, profiles, and specifications which were introduced in evidence upon the hearing in the County Court when rendered in the judgment sought to be collected by this proceeding. The replication then averred that the changes in certain laterals, which changes

were specifically set forth, did not increase or decrease the flow of water that would eventually drain into said main open ditch, nor did such alterations in any way change the map-plans, specifications or profile thereof, or change the estimate or actual cost thereof or change or in any way affect the drainage of any piece or parcel of the land situated in appellant district. The replication then averred that none of the water falling upon the land in appellant district flowed to or through any of said laterals but all of the water falling upon said lands is carried solely through the open ditch of appellee and that the general system of drainage is the same and not a different system than the one originally contemplated.

Appellant concedes that by its demurrer it is admitted that the main ditch has not been changed and that the water falling upon appellee's land would reach the main ditch by the laterals as originally specified, but it insists that by the addition of others, the water would necessarily come faster, so that after a heavy rain fall the load which the main ditch would be compelled to carry would be materially increased.

Had a material change been made in the main ditch, or if it was rendered inadequate by the addition of these laterals, or if by these laterals greater quantities of additional water would be brought to the main ditch, then appellant might have a just reason to complain, but the replication alleges and the demurrer admits that the main ditch has not been changed, but was constructed just as originally proposed. Facts are set forth in the replication from which the conclusion is drawn that the changes made in the laterals did not increase or decrease the amount of water eventually flowing into the main ditch, nor did the changes in the laterals in any way affect the drainage of any of the lands in appellant's district, and this the demurrer admits. In our opinion

were specifically set forth, did not increase or decrease the flow of water that would eventually drain into said main ditch, nor did such alterations in any way change the easements or specifications or profiles thereof, or change the estimate or cost thereof or change or in any way affect the drainage of any piece or parcel of the land situated in appellant district. The relocation then averred that none of the water falling upon the land in appellant district flowed to or through any of said laterals but all of the water falling upon said lands is carried solely through the open ditch of appellee and that the general system of drainage is the same and not a different system than the one originally contemplated.

Appellant conceded that by its demurrer it is admitted that the main ditch has not been changed and that the water falling upon appellee's land would reach the main ditch by the laterals as originally specified, but it insists that by the addition of others, the water would necessarily come faster, so that after heavy rain fall the load which the main ditch would be compelled to carry would be materially increased.

Had a material change been made in the main ditch, or if it was rendered inadequate by the addition of these laterals, or if by these laterals greater quantities of additional water would be brought to the main ditch, then appellant might have a just reason to complain, but the relocation alleges and the demurrer admits that the main ditch has not been changed, but was contemplated just as originally proposed. Facts are set forth in the relocation from which the conclusion is drawn that the changes made in the laterals did not increase or decrease the amount of water eventually flowing into the main ditch, nor did the changes in the laterals in any way affect the drainage of any of the lands in appellee's district, and this the demurrer admits. In our opinion

the demurrer to this replication was properly sustained.

By the fifth plea, appellant alleged that after appellee made its demand upon it to pay this judgment, negotiations were entered into between the two districts to settle their differences. This plea is clearly insufficient, it sets forth no facts, but only conclusions of the pleader. As suggested by counsel for appellee, the statutory duty of appellant to pay this judgment is not satisfied by a willingness of its Commissioners to negotiate a settlement with the Commissioners of appellee. The Court did not err in sustaining the demurrer to this plea.

Section Thirteen of the Adjoining Districts Act makes it mandatory for appellant to pay this judgment. Section Sixteen A (16A) of the same act permitted appellant, if it was not satisfied with the judgment rendered by the County Court to have those proceedings reviewed by the Supreme Court. This was not done. There has been a judicial determination by the proper court having jurisdiction of the subject matter and of the parties thereto of the value of the benefits to appellant and there is nothing, in our opinion, set upon the several pleas to which demurrers were sustained, which should excuse appellant from proceeding to take the necessary steps to pay this judgment, nor does the replication to the fourth plea set forth such a departure from the original plans, specifications, maps or profiles as would preclude appellee from insisting upon collecting the judgment it obtained.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

the demand for this replication was properly established.
By the fifth plea, appellant alleged that after appellee had
its demand upon it to pay this judgment, negotiations were entered
into between the two parties to settle their dispute. This
plea is clearly immaterial, as it does not show, but only
conclusions of the pleader. As suggested by counsel for appellee,
the statutory duty of appellant to pay this judgment is not satisfied
by a willingness of the Government to negotiate a settlement with
the Government of appellee. The Government did not act in settling
the demand for this plea.

Section 1000 of the Judicial Statistics Act states that
mandatory for appellant to pay this judgment. Section 1000
(1911) of the same act provides that, if it was not established
with the judgment entered by the Court, it was not established
ceding review by the Supreme Court. This was not done. There
has been a judicial determination by the Court in settling this
dispute of the subject matter and of the parties thereto. The value
of the parties to appellant and their interest in the same
set upon the several pleas to which demand was made, which
should excuse appellant from paying to the Government the
to pay this judgment, nor does the replication to the fifth plea
set forth any demand from the appellant, appellee,
nor on appellee as would provide appellee from paying upon
collecting this judgment it concerned.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof. I hereunto set my hand and affix the seal of said Appellate Court. at Ottawa. this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8616

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice. 271 I.A. 611¹

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1933.

Roxie Toomajan,

Appellee,

vs.

Appeal from Circuit Court,

Lake County.

Harry J. Toomajan,

Appellant.

HUFFMAN-J.

Appellee obtained an order in a separate maintenance suit on the 22nd day of January, A.D. 1932, against appellant for the sum of Fifteen (\$15.00) dollars, per week, temporary alimony and the further sum of Seventy-five (\$75.00) dollars, as temporary solicitors' fee. In June 1932, appellee herein, filed her petition in the Circuit Court of Lake County, Illinois, where the separate maintenance action was pending, setting forth in the said petition that the appellant had neglected and refused to make the payments hereinabove set out, and as provided for in the order of the court made therein; that appellant had sufficient funds with which to make the aforesaid payments, and that the said appellant was in arrears on the same in the amount of Ninety-five (\$95.00) dollars.

Appellant filed his answer denying his ability to pay. The cause was set down for hearing, and upon the hearing thereof, appellant was found to be in contempt of court, and that no sufficient reasons were shown why he should not have paid the said alimony as decreed. The court entered an order on the 22nd day of August, 1932, finding the said appellant in contempt, and by the ordering portion thereof, provided as follows: "It is therefore

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1933.

Roxie Toomsjan,

Appellee,

Appeal from Circuit Court,

vs.

Lake County.

Harry J. Toomsjan,

Appellant.

MURKIN-7.

Appellee obtained an order in a separate maintenance suit on the 22nd day of January, A. D. 1933, against appellant for the sum of fifteen (\$15.00) dollars, per week, temporary alimony and the further sum of seventy-five (\$75.00) dollars, as temporary solicitors' fee. In June 1933, appellee herein, filed her petition in the Circuit Court of Lake County, Illinois, where the separate maintenance action was pending, setting forth in the said petition that the appellant had neglected and refused to make the payments hereinabove set out, and as provided for in the order of the court made therein; that appellant had sufficient funds with which to make the aforesaid payments, and that the said appellant was in arrears on the same in the amount of ninety-five (\$95.00) dollars. Appellant filed his answer denying his ability to pay. The cause was set down for hearing, and upon the hearing thereof, appellant was found to be in contempt of court, and that no sufficient reasons were shown why he should not have paid the said alimony as decreed. The court entered an order on the 22nd day of August, 1933, finding the said appellant in contempt, and by the ordering portion thereof, provided as follows: "It is therefore

ordered, adjudged and decreed that the said defendant, Harry J. Toomajan, be and he is hereby committed to the common jail of Lake County, Illinois, there to remain charged with said contempt of this court until the further order of this court, or until released by due process of law."

From this judgment, the appellant prosecutes his appeal to this court, claiming that the order of committment is erroneous in that it is indefinite, uncertain in point of time, and that it is not for any fixed penalty. It does not appear from the record that the appellant was committed for any definite period, or that he was committed until he should perform certain specific acts, with which he might purge himself of the contempt. The judgment of a court should be certain and definite. It should determine the rights recovered, or the penalty to be imposed. Appellant's committment in this case should have been for a definite period, or until he had performed certain and specified acts or act, with which ^{he}/might purge himself of the contempt. People, ex rel. F.E. Hinckley v. A.F. Pirfenbrink, 96 Ill. 68.

We understand the rule to be in cases of this nature, that if the order of committment is intended as a punishment, it should fix a definite time of imprisonment; and if the order of committment is intended as a means to compel the payment of alimony or the compliance with any other certain and specified act on the part of the person held in contempt, that it should provide for such person's release upon his compliance with the specific thing to be by him done or performed. The order of imprisonment in this case provides that the said appellant, "Is hereby committed to the common jail of Lake County, Illinois, there to remain charged with said contempt of this court until the further order of this court, or until released by due process of law." It will be observed that this order leaves

ordered, adjudged and decreed that the said defendant, Harry J.

Tombsman, be and he is hereby committed to the common jail of Lake

County, Illinois, there to remain charged with said contempt of

this court until the further order of this court, or until released

by due process of law."

From this judgment, the appellant prosecutes his appeal to this

court, claiming that the order of commitment is erroneous in that

it is indefinite, uncertain in point of time, and that it is not for

any fixed penalty. It does not appear from the record that the appel-

lant was committed for any definite period, or that he was committed

until he should perform certain specific acts, with which he might

purge himself of the contempt. The judgment of a court should be

certain and definite. It should determine the rights recovered, or

the penalty to be imposed. Appellant's contention in this case should

have been for a definite period, or until he had performed certain

and specified acts or act, with which ^{he} might purge himself of the

contempt. People, ex rel. W. E. Winickley v. A. W. Finckelstein, 82

Ill. 63.

We understand the rule to be in cases of this nature, that if

the order of commitment is phrased as a punishment, it should fix

a definite time of imprisonment; and if the order of commitment is

intended as a means to compel the payment of money or the compliance

with any other certain and specified act on the part of the person

held in contempt, that it should provide for such person's release

upon his compliance with the specific thing to be by him done or

performed. The order of imprisonment in this case provides that the

said appellant, "is hereby committed to the common jail of Lake

County, Illinois, there to remain charged with said contempt of

this court until the further order of this court, or until released

by due process of law." It will be observed that this order leaves

the question for its determination open in the future. We do not understand that this is sufficient, in that it is not certain and definite enough to meet the requirements of law. Anderson v. Anderson, 124 Ill. App. 613; 6 R.C.L. Sec. 48, p. 535, 536.

Judgment reversed.

Reversed.

the question for its determination open in the future. We do not understand that this is sufficient, in that it is not certain and definite enough to meet the requirements of law. Anderson, 134 Ill. App. 613; 6 R.C.L. 2nd, 48, p. 535, 338.

Judgment reversed.

Reversed.

STATE OF ILLINOIS, }
 } ss.

SECOND DISTRICT
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8631

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 611²

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1933

Charles W. Gelino, et al

Appellees,

Appeal from Circuit Court of

vs.

Kankakee County

Fred O. Swannell, et al,

Appellants.

HUFFMAN - J.

Appellees, Charles W. and Alexander F. Gelino, on February 3, 1913, entered into a written lease with appellants, whereby two lots in the City of Kankakee, were demised to appellees for a period of twenty years at a total rental of \$184,200.00. A large store building was located on these lots and appellees leased the premises for the purpose of conducting a department store therein. Appellees' family had been engaged in the dry goods business in Kankakee, under the Gelino name, for about seventy years. Appellees took possession of the property pursuant to the lease in the spring of 1913 and continued in possession thereof, operating the department store, until on or about July 1, 1927, when said business enterprise was incorporated, with the appellees as the officials of the company, and owning 73% of the \$100,000 capital stock. The new company was named, "Gelino's, Inc." Between the time appellees went into possession of the premises under the lease, and the change in the business from a private enterprise to a corporation, appellees expended about \$40,000 of their own money in and about the improvement of the department store building, for which authority was given appellees under the terms of the lease. After the incorporation of the business, the appellees secured the written consent of appellants to sublet the premises to the corporation, and did sublet the same to the corporation at an annual rental which was \$5000.00 a year than appellees were obligated to pay under the terms of the lease.

In the Appellate Court of Illinois

Second District

May Term, A. D. 1933

Charles W. Geline, et al

Appellees,

Appel from Circuit Court of

Kankakee County

vs.

Fred O. Swannell, et al,

Appellants.

HUTMAN - 1.

Appellees, Charles W. and Alexander T. Geline, on February 3, 1913, entered into a written lease with appellants, whereby two lots in the City of Kankakee, were demised to appellees for a period of twenty years at a total rental of \$134,300.00. A large store building was located on these lots and appellees leased the premises for the purpose of conducting a department store therein. Appellees' family had been engaged in the dry goods business in Kankakee, under the Geline name, for about twenty years. Appellees took possession of the property pursuant to the lease in the spring of 1913 and continued in possession thereof, operating the department store, until on or about July 1, 1927, when said business enterprise was incorporated, with the appellees as the officials of the company, and owning 75% of the 100,000 capital stock. The new company was named, "Geline's, Inc." Between the time appellees went into possession of the premises under the lease, and the change in the business from a private enterprise to a corporation, appellees expended about \$20,000 of their own money in and about the improvement of the department store building, for which authority was given appellees under the terms of the lease. After the incorporation of the business, the appellees secured the written consent of appellants to submit the premises to the corporation, and did submit the same to the corporation at an annual rental which was \$500.00 a year, less than appellees were obligated to pay under the terms of the lease.

This arrangement continued until November 15, 1928, when a fire almost destroyed the building, and left it in such a condition as to render it unsuitable for appellees' business, it being without adequate roof and walls, and damp and otherwise untenable. The lease contained a provision that the lessors, (appellants herein) would keep the building insured against fire for 80% of the value, and that in the event of damage thereto by fire, that the money realized from the insurance should be available for the restoration of the premises to the condition existing before any such fire. Immediately after the fire, the appellees requested the appellants to effect as early an adjustment as possible of the damages to the premises with the insurance company, in order that the building might be restored and the premises put in order so that the business and good will of appellees would suffer no more than necessary. Appellees allege that appellants assured them that the losses upon the building would be promptly settled. Appellants agreed with appellees that they could make such temporary repairs as they deemed necessary, in order that they might continue to occupy such portion of the building as was possible, until reconstruction thereof was made. Pursuant to such agreement, appellees made temporary repairs for which they expended the sum of \$4,618.28.

The lease provided that in case more than 30 days expired before the restoration of the premises following a fire, a proper abatement of the rent would be made for such period of time over 30 days, based upon the portion of the premises that were unsuitable and untenable. Appellants in their letter, under date of November 28, 1928, addressed to appellees, acknowledge receipt of the payment of rent to December 1, 1928, and in this letter, state to appellees, "For any further use of the premises, not destroyed by fire, the rent therefor, can be determined by mutual agreement between us at some future time." Such agreement was not reached, and the parties became engaged in a dispute as to what portion of the rent as provided in the lease, should be abated. The lease by its terms, did not

This arrangement continued until November 12, 1932, when a fire almost destroyed the building, and left it in such a condition as to render it unsuitable for appellants' business, it being without adequate roof and walls, and damp and otherwise unsuitable. The lease contained a provision that the lessors, (appellants herein) would keep the building insured against fire for 80% of the value, and that in the event of damage thereto by fire, that the money realized from the insurance should be available for the restoration of the premises to the condition existing before any such fire. Immediately after the fire, the appellees requested the appellants to effect as early an adjustment as possible of the damages to the premises with the insurance company, in order that the building might be restored and the premises put in order so that the business and good will of appellees would suffer no more than necessary. Appellees allege that appellants assumed then that the losses upon the building would be promptly settled. Appellants agreed with appellees that they could make such temporary repairs as they deemed necessary, in order that they might continue to occupy such portion of the building as was possible, until reconstruction thereof was made. Pursuant to such agreement, appellees made temporary repairs for which they expended the sum of \$4,182.54. The lease provided that in case more than 30 days expired before the restoration of the premises following a fire, a proper statement of the rent would be made for each period of time over 30 days, based upon the portion of the premises that were undamaged and untenable. Appellants in their letter, under date of November 28, 1932, addressed to appellees, acknowledged receipt of the statement of rent to December 1, 1932, and in this letter, state to appellees, "For any further use of the premises, not destroyed by fire, the rent therefor, can be determined by mutual agreement between us at some future time." Such agreement was not reached, and the dispute became engaged in a dispute as to the portion of the rent as payable in the lease, should be apportioned. The lease by its terms, did not

prescribe any fixed method for determining such reduction, but provided that a proper abatement of the rent should be made for the excess of time over 30 days, for the portion of the premises that was unten-
antable.

Appellants had \$60,000 insurance in force on the buildings at the time of the fire. It appears the insurance companies offered to settle for \$50,000 and later increased the offer to \$55,000, which the appellants refused to accept, and insisted that the matter be referred to appraisers. This was finally done and on or about August 24, 1929, the appraisers made an award of \$47,806.56, which appellants after some delay, accepted.

Approximately $10\frac{1}{2}$ months elapsed between the date of the fire and the first work done by appellants toward the restoration of the building. During this period, the appellees endeavored to carry on the business in a portion of the premises, and to prevail upon appellants to start the rebuilding and restoration of same. Appellees charge that due to the inadequate and unsuitable condition of the building, the business suffered large losses and on November 5, 1929, became an involuntary bankrupt. Appellees charge that during the $10\frac{1}{2}$ months period, they endeavored to procure other tenants for the premises and negotiated with some 8 or more merchandising companies who were financially responsible and of good character to take over and occupy the premises. This, appellants would not agree to because of the nationality of the proposed tenants, or otherwise.

The appellants, during the work of restoring the premises, submitted to appellees, a claim for rent for the period subsequent to the fire, in the sum of \$6,291.06. The Chancellor found from the evidence that the premises following the fire, were in such condition as to be wholly untenable and of no rental value; but held that since the appellees by their sub-tenant, the corporation, had voluntarily occupied them and had agreed with appellants that the sum which they had expended for temporary repairs, was to be

prescribe any fixed method for determining such reduction, but provided that a proper statement of the rent should be made for the excess of time over 30 days, for the portion of the premises that was damaged.

Appellants had \$50,000 insurance in force on the building at the time of the fire. It appears the insurance companies offered to settle for \$50,000 and later increased the offer to \$55,000, which the appellants refused to accept, and insisted that the matter be referred to appraisers. This was finally done and on or about August 24, 1933, the appraisers made an award of \$17,808.56, which appellants after some delay, accepted.

Approximately 10 1/2 months elapsed between the date of the fire and the first work done by appellants toward the restoration of the building. During this period, the appellants endeavored to carry on the business in a portion of the premises, and to prevail upon appellants to start the rebuilding and restoration of same. Appellants charge that due to the inadequate and manifest condition of the building, the business suffered large losses and on November 5, 1933, became an involuntary bankrupt. Appellants allege that during the 10 1/2 months period, they endeavored to procure other tenants for the premises and negotiated with some 8 or more other existing companies who were financially responsible and of good character to take over and occupy the premises. This, appellants would not agree to because of the nationality of the proposed tenants, or otherwise.

The appellants, during the work of restoring the premises, submitted to appellants, a claim for rent for the period subsequent to the fire, in the sum of \$6,321.08. The Chancellor found from the evidence that the premises following the fire, were in such condition as to be wholly untenable and of no rental value; and held that since the appellants by their conduct, the construction had voluntarily occupied them and had agreed with appellants that the sum which they had expended for temporary repairs, was to be

set off against the reduced rent therefor, that the appellees were equitably charged with such sum expended by them as rental during said time.

On or before February 1, 1930, the appellees ~~t~~endered to appellants the sum of \$865.00, for rental as provided in the lease for the said month of February, which tender the appellants refused. On February 5, 1930, while the appellees were in the actual occupancy and possession of the premises, but before the work of restoration was fully completed, the appellants without notice or demand or process, entered the premises and forcibly evicted the appellees, because of the alleged non-payment of rental following the fire, in the claimed sum of \$6,291.06. The court found that the eviction of the appellees by appellants was wrongful and without lawful justification; and that there was no rent due ~~f~~rom appellees to appellants at said time but that the appellees at this time were entitled to credit on future rents in the amount of \$192.46. The court also found that appellees during the entire term of the lease and to the day of their eviction by appellants, had faithfully performed their obligations under the lease. The court further found that at the time of the eviction of appellees, the rental value of the premises was \$1250.00 per month, and ordered that the appellants should pay to appellees the excess of this amount over and above the rental provided for in the lease, from the date of such eviction to the date of the decree herein, which excess amount between said rentals was the sum of \$10,418; and further provided, that the appellees should be restored to the possession of the premises involved, to have and to hold the same under the terms of the lease.

Appellants filed their cross bill in said proceedings, claiming that appellees owed them the total sum of \$6856.30, for rental during the period following the fire, and allowing appellees a credit of \$4,618.28, because of repairs made by appellees, and

set off against the reduced rent hereafter, that the appellants have equitably charged with such sum expended by them in rental during said time.

On or before February 1, 1930, the appellants furnished to appellees the sum of \$25.00, for rental as provided in the lease for the said month of February, which tender the appellants refused. On February 5, 1930, while the appellants were in the actual occupation and possession of the premises, but before the work of restoration was fully completed, the appellants without notice or demand on process, entered the premises and forcibly evicted the appellees, because of the alleged non-payment of rental falling due that day, in the claimed sum of \$25.00. The court found that the eviction of the appellees by appellants was wrong and without lawful justification; and that there was no rent due from appellees to appellants at said time but that the appellees at this time were entitled to credit on future rents in the amount of \$25.00. The court also found that appellees during the entire term of the lease and to the day of their eviction by appellants, had faithfully performed their obligations under the lease. The court further found that at the time of the eviction of appellees, the rental value of the premises was \$125.00 per month, and ordered that the appellees should pay to appellants the excess of \$10 amount over and above the rental provided for in the lease, from the date of such eviction to the date of the breach herein, which excess amount is herein stated to be the sum of \$10.18; and further ordered that the appellees should be restored to the possession of the premises involved, to have and to hold the same from and after the term of the lease.

Appellants filed their cross bill in said proceedings, claiming that appellees owed them the total sum of \$25.00 for rental during the period following the time, and also claiming a credit of \$46.18, because of repairs made by appellees, and

claiming the appellees owed a balance on rent to the appellants herein, of the sum of \$2,238.02. The Chancellor dismissed the cross bill for want of equity.

Appellants urge for reversal that equity has no jurisdiction of this cause. This was an action brought to enforce the specific performance of a contract concerning an interest in real estate. Courts of equity will decree a specific performance where such contract is entire, certain, fair, based upon adequate consideration, and capable of being performed. Under such circumstances, the parties securing relief are as much entitled to have a specific performance in a court of equity as to secure an award of damages in a court of law for the breach of such contract. *Marshall v. Keach*, 227 Ill. 35 (46, 47); *Fowler v. Fowler*, 204 Ill. 82; *Kuhn v. Sohns*, 324 Ill. 48; *Bournique v. Williams, et al.*, 225 Ill. App. 12; *O'Connor v. Harrison*, 132 Ill. App. 264. Where land, or any estate therein, is the subject matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established. *Pomeroy's Eq. Jur.* sec. 1402. Equity once taking jurisdiction will retain jurisdiction of the whole subject matter, for the purpose of settling all matters in controversy. *Griffin v. Griffin*, 163 Ill. 216. Appellants also urge that the bill in this case is not sufficient, but this matter was determined upon prior appeal to this court, *Gelino v. Swannell*, 263 Ill. App. 235. It was held in the above case between these same parties that the bill of complaint stated sufficient facts for chancery jurisdiction, and that when chancery once acquired jurisdiction, it had the power to adjust and settle the legal and equitable differences between the parties growing out of the subject matter.

The trial court granted relief for specific performance, and decreed that appellants should deliver up possession of the premises to appellees for the remainder of the time the same were demised to appellees by the lease; and that appellants should also

claiming the appellee owed a balance on rent to the appellant
herein, of the sum of \$2,338.02. The Chancellor dismissed the
cross bill for want of equity.

Appellants urge for reversal that equity has no jurisdiction
of this cause. This was an action brought to enforce the specific
performance of a contract concerning an interest in real estate.
Counts of equity will decree a specific performance where such
contract is entire, certain, fair, based upon adequate consideration,
and capable of being performed. Under such circumstances, the
parties seeking relief are as much entitled to have a specific
performance in a court of equity as to secure an award of damages
in a court of law for the breach of such contract. *Maitland v.*
Ketch, 327 Ill. 35 (43, 47); *Kocher v. Fowler*, 304 Ill. 32; *Fuhr*
v. Schae, 334 Ill. 48; *Hornigum v. Williams*, et al., 323 Ill. App.
18; *O'Connor v. Harrison*, 132 Ill. App. 264. Where land, or any
estate therein, is the subject matter of the agreement, the legal
gravity of the legal remedy is well settled, and the equitable juris-
diction is firmly established. *Pomeroy v. Wm. Geo. Lusk*, Equity
once taking jurisdiction will retain jurisdiction of the cause
subject matter, for the purpose of settling all matters in contro-
versy. *Griffin v. Griffin*, 133 Ill. 315. Appellants also urge that
the bill in this case is not sufficient, but this matter was deter-
mined upon prior appeal to this court, *Griffin v. Grinnell*, 323 Ill.
App. 286. It was held in the above case between these same parties
that the bill of complaint stated sufficient facts for equitable
jurisdiction, and that when chancellor once acquired jurisdiction
it had the power to adjust and settle the legal and equitable
differences between the parties growing out of one and the same matter.
The trial court granted relief for specific performance,
and decreed that appellants should deliver up possession of the
premises to appellees for the remainder of the term the same were
demanded to appellees by the lease, and that appellants should

account for and pay over to appellees the excess in the rental value as aforesaid.

Appellees assign certain cross errors, which have been duly considered in the determination of this case. We find no reversible error pointed out by appellees in their cross errors. We are of the opinion that the trial court had jurisdiction of this cause, and that he fairly and equitably adjudged the differences between the parties; and in the consideration of this case as a whole, that equity was done between the parties and they received substantial justice in the decree of the Chancellor rendered herein. The decree is affirmed.

Affirmed.

account for and pay over to appellees the excess to the extent of the
as aforesaid.

Appellees assign certain errors, which have been only
considered in the determination of this case. We find no reversible
error pointed out by appellees in their cross motions. We are of
the opinion that the trial court had jurisdiction of this case,
and that he fairly and equitably adjusted the differences between
the parties; and in the cancellation of this case as a whole, that
equity was done between the parties and they received substantial
justice in the course of the Chancellor's decision. The decree
is affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8645
83 H
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice. 271 I.A. 611³

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1933

Nellie May Ellis, Executrix, etc.,
et al,

Appellees,

Appeal from Circuit Court
Livingston County

vs.

Walter Blaine Righter, et al,
Appellants,

HUFFMAN - J

This case comes to this court by transfer from the Supreme Court of Illinois, Ellis v. Righter, 351 Ill. 545. The testator Walter A. Righter, died June 30, 1923, a resident of Livingston County, Illinois. He left a surviving widow, Celestia Righter, (who died in January, 1925), and three children, Nellie May Ellis, Walter Blaine Righter and Carrie Skelley. Nellie May Ellis was made executrix of the father's will, and she and her family are appellees herein. Walter Blaine Righter and his family, are appellants herein.

The testator had various tracts of real estate located in New York, Indiana, Illinois and Kansas. In his will, he provided for the payment of his indebtedness from his personal property, and in event the personal property was not sufficient to pay the indebtedness, then he provided that the same should be a charge upon the lands devised to the devisees in his will, and should be paid equally by the three children. The executrix exhausted the personal property in the payment of claims against the estate and also converted certain real estate into cash to apply upon the payment of indebtedness of the deceased. It appears from the evidence that Walter Blaine Righter was personally obligated for

In the Appellate Court of Illinois

Second District

May Term, A. D. 1933

Nellie May Ellis, Executrix, etc.,

et al,

Appel from Circuit Court

Appellees,

Livingston County

vs.

Walter Blaine Richter, et al,

Appellants,

HUTTMAN - 3

This case comes to this court by transfer from the Supreme Court of Illinois, Ellis v. Richter, 351 Ill. 545. The testator Walter A. Richter, died June 30, 1923, a resident of Livingston County, Illinois. He left a surviving widow, Celestia Richter, (who died in January, 1933), and three children, Nellie May Ellis, Walter Blaine Richter and Garrie Skelley. Nellie May Ellis was made executrix of the father's will, and she and her family are appellees herein. Walter Blaine Richter and his family, are appellants herein.

The testator had various tracts of real estate located in New York, Indiana, Illinois and Kansas. In his will, he provided for the payment of his indebtedness from his personal property, and in event the personal property was not sufficient to pay the indebtedness, then he provided that the same should be a charge upon the lands devised to the devisees in his will, and should be paid equally by the three children. The executrix exhausted the personal property in the payment of claims against the estate and also converted certain real estate into cash to apply upon the payment of indebtedness of the deceased. It appears from the evidence that Walter Blaine Richter was personally obligated for

the sum of \$7896.21, upon which the deceased was surety. The executrix filed 5 current reports from time to time, in the county court of Livingston county. These reports were all approved by the county judge, except the last one, which recited that unpaid debts remained outstanding against the estate and that unless the parties interested, could voluntarily agree upon a settlement of the indebtedness, that the same would have to be adjusted among them by a court of equity.

The executrix brought this bill for a construction of the will and for an accounting among the legatees and devisees to see how much each should contribute to discharge the balance of the testator's indebtedness. The cause was referred to a master who made his report, and the report was confirmed by the chancellor and a decree entered in harmony therewith.

It appears that appellants and appellees entered into a contract with reference to certain property located in the states of New York and Illinois, which was approved by the county court of Livingston County and a decree entered thereon and that the terms thereof have been fully performed. The sale of real estate to pay debts was had in the usual manner by the executrix, and the appellants were made parties to said proceedings and filed no objections thereto. Appellants make 19 assignments of error and appellees made 6 assignments of cross error. The record is large. The property of the estate was scattered and the estate was badly involved. The acts and conduct of the executrix during the period in question, were reflected in her current reports filed from time to time, as aforesaid.

Appellants complain to the decree making the payment of the unpaid indebtedness against said estate, a lien upon the real estate devised. The devise in each instance is charged with its share of the payment of the testator's debts, remaining after the personal property had been exhausted. The lands were devised to the three children for life, with remainder over in fee to their children. The trial court adjusted and pro rated the amounts as between the

the sum of \$7898.21, upon which the decedent was surety. The executrix filed 5 current reports from time to time, in the county court of Livingston county. These reports were all approved by the county judge, except the last one, which recited that unpaid debts remained outstanding against the estate and that unless the parties interested could voluntarily agree upon a settlement of the indebtedness, that the same would have to be adjusted among them by a court of equity. The executrix brought this bill for a construction of the will and for an accounting among the legatees and devisees to see how much each should contribute to discharge the balance of the testator's indebtedness. The cause was referred to a master who made his report, and the report was confirmed by the chancellor and a decree entered in harmony therewith. It appears that appellants and appellees entered into a contract with reference to certain property located in the state of New York and Illinois, which was approved by the county court of Livingston County and a decree entered thereon and that the terms thereof have been fully performed. The sale of real estate to pay debts was had in the usual manner by the executrix, and the appellants were made parties to said proceedings and filed no objections thereto. Appellants make 18 assignments of error and appellees made 6 assignments of cross error. The record is large. The property of the estate was scattered and the estate was badly involved. The notes and conduct of the executrix during the period in question, were reflected in her current reports filed from time to time, as aforesaid. Appellants complain to the decree making the payment of the unpaid indebtedness against said estate, a lien upon the real estate devised. The devise in each instance is charged with its share of the payment of the testator's debts, remaining after the personal property had been exhausted. The lands were devised to the three children for life, with remainder over in fee to their children. The trial court adjusted and pro rated the amounts as between the

life tenants and the remaindermen with respect to the real estate involved. The court found the total indebtedness then unpaid to be \$33,416.33, of which sum \$7896.21, arose because of the personal obligations of Walter Blaine Righter, upon which the testator was surety. This left \$25,520.12 as the true indebtedness of the estate. Each of the three branches of the family was directed to pay \$8506.71. In each instance this amount was pro rated as aforesaid. Appellant, Walter Blaine Righter, and his remaindermen, complained because of the application of funds derived from the sale of certain real estate, as the same was applied with respect to his aforesaid personal indebtedness; he claiming that he should only be charged with the payment of one-third of his personal indebtedness, and that each of the other two branches of the family be likewise charged with the payment of one-third. We are of the opinion that this contention is without merit.

Appellees complain in their cross errors, because of the refusal of the court to consider as indebtedness against the deceased, certain assessments for drainage tax levied against land in Indiana, which was devised to appellees. We do not believe that it can be said that the testator contemplated such taxes at the time of making his will and intended to include them in the word, "indebtedness," as the same was used therein. Indebtedness in its usual accepted term, applies to an obligation to pay, arising by contract or agreement. It must be a legal liability, capable of being enforced against the individual by judgment and judicial sale of any of his property. Drainage tax is a special assessment tax, and is in the nature of a judgment in rem, directed against the lands benefited by the drainage system and lying within the district. Such taxes can ordinarily be collected only in the manner provided by the statute creating the power to levy such tax.

The trial court found that no settlement had been made between the parties concerning the remaining unpaid indebtedness of the

life tenants and the remaindermen with respect to the real estate involved. The court found the verbal indebtedness then unpaid to be \$33,413.33, of which sum \$7500.81, arose because of the contractual obligations of Walter Blain Richter, upon which the testator was surety. This left \$25,912.52 as the true indebtedness of the estate. Each of the three branches of the family was directed to pay \$8600.71. In each instance this amount was protected in a former suit. Appellant, Walter Blain Richter, and his remaindermen, complained because of the application of funds derived from the sale of certain real estate, as the same was applied with respect to his aforesaid personal indebtedness; he claiming that he should only be charged with the payment of one-third of his personal indebtedness, and that each of the other two branches of the family be likewise charged with the payment of one-third. We are of the opinion that this contention is without merit.

Appellees complain in their cross motion, because of the refusal of the court to consider as indebtedness against the deceased, certain assessments for drainage tax levied against lands in Indiana, which was devised to appellees. We do not believe that it can be said that the testator contemplated such taxes at the time of making his will and intended to include them in the word, "indebtedness," as the same was used therein. Indebtedness in its usual accepted sense applies to an obligation to pay, arising by contract or agreement. It must be a legal liability, capable of being enforced against the individual by judgment and judicial sale of any of his property. Drainage tax is a special assessment tax, and is in the nature of a judgment in rem, directed against the lands benefited by the drainage system and lying within the district. Such taxes are ordinarily be collected only in the manner provided by the statute creating the power to levy such tax.

The trial court found that no settlement had been made between the parties concerning the remaining unpaid indebtedness of the

estate of the testator, with which they and the lands devised to them are charged under the terms of the will. In its decree, the court made specific findings as to the amount each of the parties was adjudged to owe, according to the terms of the will under which they took, and these amounts were ordered to be paid by the several parties in the manner of a money judgment; and provided that the same should be a lien and charge upon the real estate so devised, and that in default of payment, the same be sold, and that the sums so found to be due, be a lien upon the proceeds derived from the sale of the real estate devised to said parties, in the manner and in the amount as fixed in the decree.

Careful consideration has been given to the many questions raised in this case, growing out of the administration of the estate, the exceptions to the master's report, and the assignment of errors and cross errors urged herein. The dispute between the parties culminated after a period of some five or six years, in which the executrix had been endeavoring to discharge the indebtedness against this estate. The transactions are so numerous and the disputes so various, that we are precluded from a discussion of them in this opinion.

After a careful investigation of the matters involved and of the contention of the parties herein, we are of the opinion, that the decree of the trial court is equitable and pursuant to the intention of the testator as expressed in his will, and in conformance to the terms thereof. We are satisfied that the decree in this case, under all the facts and circumstances, is fair, and that substantial justice has been done, and that the decree should be affirmed.

Affirmed.

estate of the testator, with which they and the lands devised to them are charged under the terms of the will. In its decree, the court made specific findings as to the amount due of the parties was adjudged to owe, according to the terms of the will under which they took, and these amounts were ordered to be paid by the several parties in the manner of a money judgment; and provided that the same should be a lien and charge upon the real estate so devised, and that in default of payment, the same be sold, and that the sums so found to be due, be a lien upon the proceeds derived from the sale of the real estate devised to said parties, in the manner and in the amount as fixed in the decree.

Careful consideration has been given to the many questions raised in this case, growing out of the administration of the estate, the exceptions to the master's report, and the assignment of errors and cross errors urged herein. The dispute between the parties culminated after a period of some five or six years, in which the executor had been endeavoring to discharge the indebtedness against this estate. The transactions are so numerous and the disputes so various, that we are precluded from a discussion of them in this opinion.

After a careful investigation of the matters involved and of the contention of the parties herein, we are of the opinion, that the decree of the trial court is equitable and pursuant to the intention of the testator as expressed in his will, and in conformity to the terms thereof. We are satisfied that the decree in this case, under all the facts and circumstances, is fair, and that substantial justice has been done, and that the decree should be affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8653

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 611⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D. 1933.

The People, etc., ex rel

Gibboney,

Appellee

v.

Appeal from Circuit Court,

Board of Education, etc.,

Winnebago County.

Appellant.

HUFFMAN-J.

This was a petition for mandamus filed by the appellee herein, in the Circuit Court of Winnebago County, and directed against Appellant, the Board of Education of the School District of the city of Rockford, in said County. The petition sought a writ of mandamus to compel the said Board of Education to admit Juan Homs, Jr., to the Rockford Senior High School, as a free pupil.

The petition sets out in addition to the usual allegations, that the parents of Juan Homs, Jr., are citizens of the United States; that for many years the father, Juan Homs, Sr., had been employed as foreign representative for various American Manufacturing companies; that his employment had necessitated his living abroad at different times, and also his living in divers cities in the United States; but that during all of said time when the father was not so employed, that he and his said family lived in the city of Rockford, Illinois, and that said city was their domicile and actual place of abode.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A.D. 1933.

The People, etc., ex rel
Gibboney,

Appellee

Appeal from Circuit Court,
Winnebago County.

v.

Board of Education, etc.,
Appellant.

HUTCHINSON-7.

This was a petition for mandamus filed by the appellee herein, in the Circuit Court of Winnebago County, and directed against Appellant, the Board of Education of the School District of the City of Rockford, in said County. The petition sought a writ of mandamus to compel the said Board of Education to admit Juan Jones, Jr., to the Rockford Senior High School, as a free pupil. The petition sets out in addition to the usual allegations, that the parents of Juan Jones, Jr., are citizens of the United States; that for many years the father, Juan Jones, Sr., has been employed as foreign representative for various American manufacturing companies; that his employment had necessitated his living abroad at different times, and also his living in diverse cities in the United States; but that during all or said times when the father was not so employed, that he and his said family lived in the City of Rockford, Illinois, and that said city was their domicile and actual place of abode.

It appears from the evidence that the father was originally a Spanish subject, and that he became^a/naturalized American citizen about fifteen years prior to the filing of this suit; that he married Marjorie Gibboney Homs of Rockford, Illinois; that both of said parties were residents of the said city of Rockford at the time of their marriage; that shortly after said marriage, the said Juan Homs made trips to various foreign countries as business representative of Emerson-Brantingham Company; that he made trips to Mexico and South America; that during this time the said parents continued their residence in the city of Rockford, living on Elm Street; that later the said father became employed as a commercial agent by the United States Government and made trips to South Africa and New Zealand. The evidence discloses that during the entire time the said father has been almost continually employed as the foreign representative of various American business concerns, and that during periods of unemployment, he returned to his home on Independence Avenue, in Rockford, Illinois. The evidence further shows that the said Juan Homs, Jr., who is seventeen years of age, has received practically his entire education in the public schools of Rockford; that prior to six years of age he attended a school in Rockford, conducted by Miss Yates; that after attaining the age of six, he entered a public school, known as the Ellis School, in Rockford; that he finished at this school, and later attended the Roosevelt Junior High School of Rockford; and that now he wishes to attend the Senior High School of Rockford.

The father on July 4, 1930, sailed from New York City to South America, as the business representative of the Caterpillar Tractor Company, of Peoria, Illinois, where he has from said time hitherto, lived in the city of Rio de Janeiro, Brazil.

The evidence further discloses that no tuition was demanded by the appellant district or by any other board of education in said City of Rockford for the attendance by the said Juan Homs, Jr.,

It appears from the evidence that the latter was originally a Go ahead subject, and that he became a naturalized citizen about fifteen years prior to the filing of the suit; that he was Marjorie Gibson's husband of Rockford, Illinois; that both of said parties were residents of the said city of Rockford at the time of their marriage; that shortly after said marriage, the said John Homa made trips to various foreign countries as business representative of Emerson-Brantingham Company; that he made trips to Mexico and Central America; that during this time the said parents continued their residence in the city of Rockford, living on Elm Street; that later the said father became employed as a commercial agent by the United States Government and made trips to South Africa and New Zealand. The evidence discloses that during the entire time the said father has been almost continually employed as the foreign representative of various American business concerns, and that during periods of unemployment, he returned to his home on Independence Avenue, in Rockford, Illinois. The evidence further shows that the said John Homa, Jr., who is seventeen years of age, has received practically his entire education in the public schools of Rockford; that during to six years of age he attended a school in Rockford, conducted by Miss Yates; that after attaining the age of six, he entered a public school, known as the Ellis School, in Rockford; that he finished at this school, and later attended the Roosevelt Junior High School of Rockford; and that now he wishes to attend the Senior High School of Rockford. The latter on July 4, 1937, called from New York City to America, as the business representative of the Caterpillar Tractor Company, of Peoria, Illinois, where he has from said time since, lived in the city of Rio de Janeiro, Brazil. The evidence further discloses that the father and mother of the appellant district or by any other name or name in said City of Rockford for the attendance of the said John Homa, Jr.,

at any of the public schools, prior to his entrance to the Senior High School, and that no tuition was paid. The appellant district now demands tuition, claiming that the parents of the said Juan Homs, Jr., no longer have their domicile in the said city of Rockford.

We do not believe that there has been any material change in the nature of the employment of the said father during any of the time. He was a resident of the city of Rockford before and at the time of his marriage. He married the sister of Robert M. Gibboney, relator herein, and the city of Rockford was her home. The parents of Juan Homs, Jr., are American citizens, and citizenship implies some place of permanent abode or fixed domicile within the borders of the country to which allegiance is owed. The fact that one is employed in a business, the nature of which requires his living abroad or living at some place other than his true domicile, does not necessarily change either his citizenship or his domicile. The question of domicile is a question of intent, and to effect a change of domicile there must be an actual abandonment of the same, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home. The old home must be actually abandoned and a permanent one established in the new place of residence. *Holt v. Hendee*, 248 Ill. 288; *The People v. Estate of Moir*, 207 Ill. 180; *Moffett v. Hill*, 131 Ill. 239; *Miller v. Brinton*, 294 Ill. 177. A residence or domicile once established, is presumed to continue, and one alleging that a change of domicile has taken place has the burden of proof, *The People v. Estate of Moir*, 207 Ill. 180. Since the question of change of domicile is largely a matter of intent to be determined by the facts and circumstances in each particular case, it therefore becomes necessary that each case be determined from the facts and circumstances of that particular case. Here the

at any of the public schools, prior to his entrance to the Senior High School, and that no tuition was paid. The defendant now demands tuition, claiming that the parents of the said John Homa, Jr., no longer have their domicile in the said city of Rockford. We do not believe that there has been any material change in the nature of the employment of the said father during any of the time. He was a resident of the city of Rockford before and at the time of his marriage. He married the sister of Robert W. Gibson, a resident herein, and the city of Rockford was her home. The parents of John Homa, Jr., are American citizens, and citizenship implies some place of permanent abode or fixed domicile within the borders of the country to which allegiance is owed. The fact that one is employed in a business, the nature of which requires his living abroad or living at some place other than his true domicile, does not necessarily change either his citizenship or his domicile. The question of domicile is a question of intent, and to effect a change of domicile there must be an actual abandonment of the same, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home. The old home must be actually abandoned and a permanent one established in the new place of residence. *Mottett v. Hill*, 131 Ill. 239; *Waller v. Brinton*, 234 Ill. 147. *A v. Hardee*, 243 Ill. 289; *The People v. Estate of Holt*, 207 Ill. 190; *The People v. Estate of Holt*, 207 Ill. 190. 329. and one alleging that a change of domicile has taken place has the burden of proof. *The People v. Estate of Holt*, 207 Ill. 190. 329. the question of change of domicile is largely a matter of intent to be determined by the facts and circumstances in each particular case, it therefore becomes necessary that each case be determined from the facts and circumstances of that particular case. Here the

evidence shows that upon each change of employment or loss of employment, the parents returned to the city of Rockford and continued to live there until they secured new employment. It appears that Rockford was their domicile before and at the time of their marriage, and that since said time their conduct and the facts and circumstances in this case go to show that they have considered it as their place of permanent abode and domicile. The father files his income tax report in the Chicago district. It appears in the petition of relator that Juan Homs, Sr., has his will and insurance policies deposited with relator in the city of Rockford. His being employed abroad, in foreign countries, does not change his citizenship, and as a citizen he has the right to maintain a permanent abode and domicile of his own choosing and selection, in his own country.

As has been stated, the evidence discloses that the city of Rockford was the domicile of the parents of Juan Homs, Jr., at the time of their marriage; that the said Juan Homs, Jr., has received practically his entire education in the public schools of Rockford; that tuition was never before demanded or paid. There is nothing in the record to indicate that the father's living in Brazil, is not wholly dependent upon his present employment by the Caterpillar Tractor Company, and coincident with such employment, in period of time. The evidence shows that his living in other foreign countries in connection with his other positions, in each instance was coincident with the term of such employment; and that after any such employment terminated, he returned to Rockford, until he could secure another position. There is nothing in the record to indicate that his living in Brazil is under any different circumstances than his living in other foreign countries under other employment, prior thereto. In none of those instances did he abandon his domicile in Rockford. Under such circumstances, we are

evidence shows that upon each change of employment or place of employment, the parents returned to the city of Rockford and continued to live there until they secured new employment. It appears that Rockford was their domicile before and at the time of their marriage, and that since said time their domicile and the facts and circumstances in this case go to show that they have considered it as their place of permanent abode and domicile. The father files his income tax report in the Chicago district. It appears in the petition of father that Juan Home, Sr., and his wife and insurance policies deposited with father in the city of Rockford. His being employed abroad, in foreign countries, does not change his citizenship, and as a citizen he has the right to maintain a permanent abode and domicile of his own choosing and selection, in his own country.

As has been stated, the evidence discloses that the city of Rockford was the domicile of the parents of Juan Home, Sr., at the time of their marriage; that the said Juan Home, Sr., has received practically his entire education in the public schools of Rockford; that tuition was never before demanded or paid. There is nothing in the record to indicate that the father's living in Brazil, is not wholly dependent upon his present employment by the Caterpillar Tractor Company, and coincident with such employment, in period of time. The evidence shows that his living in other foreign countries in connection with his other positions, in each instance was coincident with the loss of such employment; that after such employment terminated, he returned to Rockford, until he could secure another position. There is nothing in the record to indicate that his living in Brazil is under any circumstances other than his living in other foreign countries under similar employment, prior thereto. In none of these instances did he abandon his domicile in Rockford. Under such circumstances, he was

not justified in assuming here, that the father has changed his intention to keep his permanent abode and domicile in the city of Rockford, and to establish it elsewhere. As we view this case, the trial court did not err in its order awarding the writ herein, and its judgment therein is hereby affirmed.

Affirmed.

not testified in examining him, that the father was ordered
his intention to keep his permanent abode and domicile in the
city of Rockford, and to establish it elsewhere. As we view
this case, the trial court did not err in its order granting
the writ herein, and its judgment therein is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8662

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 611⁵

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1933.

GEORGE JACKSON,

Appellee,

vs.

Appeal from Circuit Court,

ILLINOIS CENTRAL RAILROAD
COMPANY, a corporation,

Kankakee County.

Appellant.

HUFFMAN-J.

This is an action wherein appellee recovered judgment against appellant company for the sum of Three Hundred Forty-one (\$341.00) dollars, as damages to his automobile by reason of a collision with one of appellant company's trains. The suit was originally commenced by appellee in the Justice of the Peace Court, and upon appeal to the Circuit Court of Kankakee County, the above judgment resulted, from which this appeal is prosecuted to this court.

It is claimed by appellee that he was driving his automobile on the night of February 14th, 1932, in the village of Manteno, and that as he undertook to drive his said automobile across the tracks of appellant company on North Third Street in said village, that the engine of his automobile stalled and the car stopped. It was about 10:30 or 11 o'clock at night. Appellee states that he was operating his automobile at the rate of 20 miles per hour, when he drove the same upon the crossing in question; and claims that the crossing over appellant company's tracks on said Street was filled with loose gravel and stone, and so rough and full of holes, that it caused his engine to stall and the car to stop.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1933.

GEORGE JACKSON,

Appellee,

vs.

Appeal from Circuit Court,

Kankakee County.

ILLINOIS CENTRAL RAILROAD
COMPANY, a corporation,

Appellant.

HUFFMAN-1.

This is an action wherein appellee recovered damages against appellant company for the sum of Three Hundred Forty-one (341.00) dollars, as damages to his automobile by reason of a collision with one of appellant company's trains. The suit was originally commenced by appellee in the Justice of the Peace Court, and upon appeal to the Circuit Court of Kankakee County, the above judgment resulted, from which this appeal is prosecuted to this court.

It is claimed by appellee that he was driving his automobile on the night of February 14th, 1932, in the village of Lawrence, and that as he undertook to drive his said automobile across the tracks of appellant company on North Third Street in said village, that the engine of his automobile stalled and the car stopped. It was about 10:30 or 11 o'clock at night. Appellee states that he was operating his automobile at the rate of 20 miles per hour, when he drove the same upon the crossing in question; and claims that the crossing over appellant company's tracks on said street was filled with loose gravel and stones, and so rough and full of holes, that it caused his engine to stall and the car to stop.

There were five sets of tracks at this particular crossing on North Third Street, over which said appellee was operating his car. The evidence shows that appellee's car stopped upon the third set of tracks. Appellee claims that when the engine "died," that he "stepped on the starter," but that the same would not work and would not turn the engine over and the engine would not start; that he saw appellant's train approaching from the south and that it was more than a quarter of a mile from said crossing; he states that he stepped on the self-started of his car several times, but that it would not work; that he then got out of his car and tried to crank it, but was unsuccessful in the attempt; that he tried to push his automobile off the track, and was unable to do so; that his said automobile was on the track about five minutes from the time it stopped until appellee left it. Appellee further states that after leaving his car that he stood on the crossing and waved his hat. Appellee stated that he did not know what stalled the engine, but gave as his opinion that it was the rough condition of the crossing as above set ~~fe~~ out. Appellee further claims that he did not know what the trouble was with the self-started on his car, and that he did not know when was the last time the battery on said car had been charged.

The train collided with appellee's automobile, causing the damage sued for. It appears from the evidence of the trainmen who were in charge of the operation of appellant's train that it was a freight consisting of fifty cars, forty-eight of which were loaded; that the train was running at about the speed of forty miles per hour, which was the usual speed for a train of that size at that place; that it is upgrade on that railroad approaching this village, for a distance of about two and one-half miles; that the engineer and fireman first saw the obstruction upon the crossing when the train was about nine hundred feet from that place; that the

There were five sets of tracks at this particular crossing on North Third Street, over which said appliances was operating his car. The evidence shows that appellee's car stopped upon the third set of tracks. Appellee claims that when the engine "died," that he "stepped on the starter," but that the same would not work and would not turn the engine over and the engine would not start; that he saw appellant's train approaching from the south and that it was more than a quarter of a mile from said crossing; he states that he stepped on the self-starter of his car several times, but that it would not work; that he then got out of his car and tried to crank it, but was unsuccessful in the attempt; that he tried to push his automobile off the track, and was unable to do so; that his said automobile was on the track about five minutes from the time it stopped until appellee left it. Appellee further states that after leaving his car that he stood on the crossing and waved his hat. Appellee states that he did not know what stalled the engine, but gave as his opinion that it was the rough condition of the crossing as shown set out. Appellee further claims that he did not know what the trouble was with the self-starter on his car, and that he did not know when was the last time the battery on said car had been charged. The train collided with appellee's automobile, causing the damage and for. It appears from the evidence of the testimony who were in charge of the operation of appellant's train that it was a freight consisting of fifty cars, forty-eight of which were loaded; that the train was running at about the speed of forty miles per hour, which was the usual speed for a train of that size at that place; that it is a grade on that railroad approaching this village, for a distance of about two and one-half miles; that the engineer and fireman first saw the obstruction upon the crossing when the train was about nine hundred feet from that place; that the

engineer immediately shut off the steam and applied the brakes, and that they were in good order; that as soon as he saw the obstruction was an automobile, he made a quick application of the emergency brakes; that it was impossible for him to stop the train within the distance from where he first saw the automobile of appellee and the crossing in question. The evidence discloses that the engineer was on the right side of the engine and that he was looking forward down the track as the train approached the said village of Manteno on the night in question. It further appears that the fireman was looking from his window in the cab of said engine; that the head-light was working properly and would disclose objects seven or eight hundred feet ahead of said engine. The evidence further discloses that the crossing in question was in good condition and was equipped with automatic electric signal lights; that there were no holes in the crossing and the rock and gravel between the rails was not loose as claimed by appellee, but was packed; and that board planks were laid next to each rail in each set of tracks. The population of the village of Manteno is approximately twelve hundred, and the tracks of appellant company at the crossing in question, pass along the east side of said village.

It appears from the evidence that it was impossible to stop the train between the point where the trainmen first saw appellee's car and the crossing upon which the same was stalled. Appellee offers nothing to refute this evidence. The photographs introduced, show the crossing to be as claimed by appellant company and not as that he did not operate his car the morning of the accident, and claimed by appellee. Appellee stated/that he did not know the battery in said car was low. It appears from the testimony of the witness, Yonke, that on the morning of the day of the accident, that appellee requested Yonke to take his car and give appellee's car a pull to get it started and that he pulled appellee's car around the block in order to get it started. Appellee in response to this testimony of the witness Yonke, replied that he couldn't crank his car; that it was a large car and hard to crank; that the started

engineer immediately shut off the steam and applied the brakes, and that they were in good order; that as soon as he saw the operation was an automobile, he made a quick application of the emergency brakes; that it was impossible for him to stop the train within the distance from where he first saw the automobile of appellee and the crossing in question. The evidence discloses that the engineer was on the right side of the engine and that he was looking for and down the track as the train approached the said village of Manteno on the night in question. It further appears that the first man was looking from his window in the cab of said engine; that the head-light was working properly and would disclose objects seven or eight hundred feet ahead of said engine. The evidence further discloses that the crossing in question was in good condition and was equipped with automatic electric signal lights; that there were no poles in the crossing and the track and gravel between the rails was not loose as claimed by appellee; but was packed; and that board planks were laid next to each rail in each set of tracks. The population of the village of Manteno is approximately twelve hundred, and the tracks of appellant company at the crossing in question, pass along the east side of said village.

It appears from the evidence that it was impossible to stop the train between the point where the train first saw appellee's car and the crossing upon which the same was stalled. Appellee offers nothing to refute this evidence. The photographs introduced show the crossing to be as claimed by appellant company and not as claimed by appellee. Appellee stated that he did not know the battery in said car was low. It appears from the testimony of the witness, Yonke, that on the morning of the day of the accident, appellee requested Yonke to take his car and five appellee's car to get it started and that he pulled appellee's car around the block in order to get it started. Appellee in response to this testimony of the witness Yonke, replied that he did not know the car; that it was a large car and had no crank; that the starter

would not turn it and that he could not get it started. The stenographer who was present when the agent of appellant took the statement of appellee regarding the accident, stated that appellee said that he had stopped the car previous to going upon the crossing in order to permit a passenger train to pass, and that when appellee started to drive his car across said tracks, that he killed his engine; that he stated that the battery was low and would not work, and that that was the reason he could not start it. Appellee denied making these statements.

This case being originally instituted in Justice of the Peace Court, has no pleadings, and therefore, the appellee might recover either upon the grounds of negligence of wilfull misconduct. There is nothing to support the latter and it has not been considered. With reference to negligence, the only testimony offered on behalf of appellee was his own. The evidence of appellant to the effect that every effort was made to stop the train and avoid the accident, stands uncontradicted. The evidence of appellant as to the condition of the crossing, refutes the testimony of appellee that the same was rough, filled with loose gravel and full of holes, and that the rails stood up in such a manner as to stall his engine. We are unable to determine from the evidence how appellee's engine happened to stall, but it was through no fault of appellant that the self-started on appellee's car was not in proper working order, and that the mechanism of said car was so out of order that it would not start the engine, thereby enabling him to drive his automobile from the crossing of appellant company. Appellee stated that his car was stalled five minutes before he left it, which would have given him sufficient time to have started it and driven the same across the tracks in question had it been in proper working order. We do not believe that appellee has shown any negligence on the part of appellant company in its operation of said train or in its efforts to avoid the collision.

would not turn it and that he could not get it started. The stenographer who was present when the agent of appellant took the statement of appellee regarding the accident, stated that appellee said that he had stopped the car previous to going down the crossing in order to permit a passenger train to pass, and that when appellee started to drive his car across said tracks, that he killed his engine; that he stated that the battery was low and would not work, and that that was the reason he could not start it. Appellee denied making these statements.

This case being originally instituted in Justice of the Peace Court, has no findings, and therefore, the appellee cannot recover either upon the grounds of negligence or willful misconduct. There is nothing to support the latter and it has not been considered. With reference to negligence, the only testimony offered on behalf of appellee was his own. The evidence of appellee as to the effect that every effort was made to stop the train and avoid the accident, stands uncontradicted. The evidence of appellee as to the condition of the crossing, relates the testimony of appellee that the same was rough, filled with loose gravel and full of holes, and that the rails stood up in such a manner as to strike his engine. We are unable to determine from the evidence how appellee's engine happened to stall, but it was through no fault of appellant that the self-started on appellee's car was not in proper working order, and that the mechanism of said car was so out of order that it would not start the engine, thereby enabling him to drive the car while the crossing of appellant company. Appellee stated that his car was stalled five minutes before he left it, which would have given him sufficient time to have started it and driven the same across the tracks in question had it been in proper working order. We do not believe that appellee has shown any negligence on the part of appellant company in its operation of said train or in its efforts to avoid the collision.

Adverse as we are to holding that the verdict of the jury is against the weight of the evidence, yet, we are compelled to this conclusion in this case and so find that the verdict is against the manifest weight of the evidence, and this cause is reversed and remanded.

Reversed and Remanded.

Adverse as we are to holding that the verdict of the jury is against the weight of the evidence, yet, we are compelled to do so in this case and say that the verdict is against the manifest weight of the evidence, and this case is reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8668

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 612¹

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1933.

G. A. HUTCHINSON,

Appellee,

v.

Appeal from Circuit Court,

F. G. SIMPSON,

Lake County.

Appellant

HUFFMAN-J.

This case originated in justice court, where appellee secured a judgment, and from which judgment appellant in this proceeding, perfected an appeal to the Circuit Court of Lake County, whereupon in a trial in said court, had before a jury, verdict was returned against appellant herein for the sum of Four Hundred forty (\$440.00) dollars.

The action arose by reason of a collision of appellant's and appellee's automobiles. Appellant sets out two points assigned as error, for the reversal of this case. First of which is the giving of Instruction Number One, on behalf of appellee, Hutchinson, who was plaintiff below. Appellant does not argue this assignment of error, and errors assigned and not argued, are deemed to be waived. People v. Cochran, 313 Ill. 508; Trustees, etc., v. Chambers, 240 Ill. App. 295. Therefore, the propriety of that instruction is not essential to the consideration of this case. The next point relied upon by appellant for the reversal of this cause is directed toward Instruction Number Two, which was an instruction to the Jury as to the form of their verdict in the event they found the issues in favor of the plaintiff; and the objection urged to this instruction is that the court inserted therein in the space provided for the amount of damages, the words,

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1932.

G. A. HUTCHINSON,

Appellee,

v.

Appeal from Circuit Court,

Lake County.

F. G. SIMPSON,

Appellant

HUTCHMAN-1.

This case originated in Justice Court, where appellee secured a judgment, and from which appellant appealed in this proceeding, perfected an appeal to the Circuit Court of Lake County, whereupon in a trial in said court, and before a jury, verdict was returned against appellant herein for the sum of four hundred forty (\$400.00) dollars.

The action arose by reason of a violation of appellant's and appellee's automobile. Appellant sets out two points assigned as error, for the reversal of this case. First of which is the giving of instruction number one, in behalf of appellee, Hutchman, who was plaintiff below. Appellant does not object to this instruction of error, and errors assigned and not argued, are deemed to be waived. People v. Cooper, 313 Ill. 502; People v. ... Chambers, 240 Ill. App. 388. Therefore, the reversal of this instruction is not essential to the consideration of this case. The next point relied upon by appellant for the reversal of this cause is directed toward instruction number two, which was an instruction to the jury as to the time of said trial; and the event they found the issues in favor of the plaintiff; and the objection urged to this instruction is that was overly favorable therein in the space provided for the amount of damages, and more,

"Four Hundred Forty Dollars." Appellant urges that it was error for the court to insert the amount of damages to be assessed by the jury, in the form of verdict tendered. While this is not a practice to be indulged in generally, yet, the appellant does not urge or argue that the verdict is excessive. He urges, that it was error within itself of the court to thus insert the amount of damages in the form of verdict. We do not believe that this constitutes error under all circumstances.

The evidence in this case was in no wise in conflict or dispute as to the amount of damages. Only one witness testified upon that question. He was engaged in the automobile business, knew the car that belonged to appellee, saw the same shortly before the accident and shortly after the accident. He was called as an expert witness and gave as his opinion, that the car before the accident had a fair cash value of Five Hundred Dollars, and it appears from the evidence that after the accident, its fair cash market value was Sixty Dollars. This was the only evidence offered upon the question of damages, and no objection appears to the same. In the absence of contradictory testimony, the jury is not at liberty to substitute its opinion for undisputed facts appearing in the evidence. In addition to the amount of damages not being in dispute, is the further fact that appellant does not urge that the verdict is excessive.

We do not find that the cases cited by appellant are in point or necessarily controlling herein. They were cases where the evidence was either sharply in dispute, or the very nature of the damages sought to be recovered was not such as to be susceptible of any definite computation, (such as damages for noxious odors or overflow to lands,) and were actions wherein the damages in dispute lay within the province of the jury.

We do not believe that the insertion of the amount of damages,

"Four Hundred Forty Dollars." Appellant urges that it was error for the court to insert the amount of damages to be assessed by the jury, in the form of verdict tendered. While this is not a practice to be indulged in generally, yet, the appellant does not urge or argue that the verdict is excessive. He urges, that it was error within itself of the court to thus insert the amount of damages in the form of verdict. He does not believe that this constitutes error under all circumstances.

The evidence in this case was in no wise complicated or disputed as to the amount of damages. Only one witness testified upon that question. He was engaged in the automobile business, knew the car that belonged to appellee, saw the same shortly before the accident and shortly after the accident. He was called as an expert witness and gave as his opinion, that the car before the accident had a fair cash value of Five Hundred Dollars, and it appears from the evidence that after the accident, its fair cash market value was Sixty Dollars. This was the only evidence offered upon the question of damages, and no objection appears to the same. In the absence of contradictory testimony, the jury is not at liberty to substitute its opinion for undisputed facts appearing in the evidence. In addition to the amount of damages not being in dispute, is the further fact that appellant does not urge that the verdict is excessive.

We do not find that the cases cited by appellant are in point or necessarily controlling here. They were cases where the evidence was either sharply in dispute, or the very nature of the damages sought to be recovered was not such as to be susceptible of any definite computation, (such as damages for nominal loss or overvaluation to lands,) and were actions wherein the damages in dispute were within the province of the jury.

We do not believe that the insertion of the amount of damages

which had been proven upon the trial and which was not in dispute, by the court in the form of verdict submitted, was reversible error in this case. We do not believe that such action was prejudicial to the appellant's rights. It could have had nothing to do in causing the jury to find the issues against the said defendant in the trial court. The form of verdict was usual and regular, except that the amount of damages proven had been inserted. This did not constitute any proof of the guilt of the defendant. It had only to do with the question of damages to the plaintiff, the extent and amount of which were not in dispute. Therefore, we do not believe that the action of the trial court in any way tended to deprive the defendant, Simpson, of a fair and impartial trial on all controverted questions of fact. The jury had to first pass upon the negligence of the defendant before it could assess any damages, and after having placed the responsibility for the collision upon the defendant below, the jury had no right to go outside the undisputed evidence and substitute its own opinion as to the extent of undisputed property damage. Where the amount of damage is not in dispute and rests purely in computation, we do not believe it is reversible error for the court to insert the exact amount of such undisputed damages, in the verdict. It would be mere idle form for a jury under such circumstances to return a verdict for plaintiff at a sum different than appeared by ^{un}questioned evidence. Mass. Mut. Life Ins. Co. v. Kellogg 82 Ill. 614; Wiel v. Fed. Life Ins. Co. 182 Ill. App. 322.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

which had been proven upon the trial and which was not in error, by the court in the form of verdict admitted, was reversible error in this case. We do not believe that such action was prejudicial to the appellant's rights. It could have had nothing to do in constituting a jury to find the issues against the said defendant in the trial court. The form of verdict was usual and regular, except that the amount of damages proven had been inserted. This did not constitute any error of the guilt of the defendant. It had only to do with the question of damages to the plaintiff, the extent and amount of which was not in dispute. Therefore, we do not believe that the action of the trial court in any way tended to deprive the defendant, Stinson, of a fair and impartial trial on all controverted questions of fact. The jury had to first pass upon the negligence of the defendant before it could assess any damages, and after having placed the responsibility for the collision upon the defendant below, the jury had no right to go outside the undisputed evidence and substitute its own opinion as to the extent of undisputed property damage. Where the amount of damage is not in dispute and rests purely in computation, we do not believe it is reversible error for the court to insert the exact amount of such undisputed damages in the verdict. It would be more idle for a jury under such circumstances to return a verdict for plaintiff at a sum different than appeared by the undisputed evidence. Mass. Mut. Life Ins. Co. v. Kellon, 32 Ill. 314; Fire v. Lee, 111 Ill. 60. 132 Ill. 40. 322.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8419

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

271 I.A. 612²

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 20 1933 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1932.

Minnie Kuenzel, Administratrix
of the Estate of Richard Kuenzel,
Deceased,

Appellee

vs.

Appeal from the Circuit Court
of DuPage County.

Chicago Great Western Railroad
Company, a Corporation,

Appellant

Per Curiam:-

This is an appeal prosecuted by Chicago Great Western Railroad Company, a corporation, appellant, to reverse a judgment for \$4500.00 and costs of suit, entered on the verdict of a jury in favor of Minnie Kuenzel, administratrix of the estate of Richard Kuenzel, deceased, appellee, for the death of appellee's intestate through the alleged wrongful act of appellant when a Ford automobile driven by the deceased was struck by appellant's freight train at the intersection of its track and Villa Avenue, in the Village of Villa Park.

The declaration consists of five counts. The first is a general negligence count; the second avers that the appellant did not have a bell of statutory weight rung nor a whistle sounded as required by statute; the third avers that the appellant did not sound the whistle, ring a bell or operate any other signal; the fourth and fifth are based upon certain sections of an ordinance of the Village of Villa Park, which counts were, on motion of appellant, stricken from the declaration.

It appears from the evidence that appellee's intestate died on the date of the collision; that Villa Avenue runs north and south

IN THE FEDERAL COURT OF THE UNITED STATES

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SECRET U.S. AIR FORCE

Witness Kuenzel, Administrative
of the Estate of Richard Kuenzel,
Deceased,

Abel's

1. The first step is to identify the problem.
 2. The second step is to analyze the problem.
 3. The third step is to develop a solution.
 4. The fourth step is to implement the solution.
 5. The fifth step is to evaluate the solution.

.2V

Chicago Great Western Railroad
Company, a Corporation,

transfere

Per Curiam:-

This is an appeal prosecuted by Chicago Great Western Railroad Company, a corporation, defendant, to reverse a judgment for \$4500.00 and costs or writ, entered on the verdict of a jury in favor of Minnie Kuesel, administratrix of the estate of Edward Kuesel, deceased, for the death of Edward Kuesel, deceased, through the alleged negligence of the Chicago Great Western Railroad Company, driven by the deceased and Edward Kuesel, deceased, at the intersection of 14th Street and Lake Avenue, on the morning of

VIIIa 3214.

The declaration consists of three counts. The first is a negligence count; the second is a count for breach of contract; the third is a count for breach of warranty. The first count is a negligence count; the second is a count for breach of contract; the third is a count for breach of warranty. The first count is a negligence count; the second is a count for breach of contract; the third is a count for breach of warranty.

the date of the collision; that Willie Adams lived about 1900 and was

and appellant's railroad east and west; that the train which struck the deceased was moving in an easterly direction; that the deceased was driving a Ford car south on the west side of Villa Avenue; that the automobile in which the deceased was riding seemed to stop on the track and was there struck by the train and that there was, at the time of the collision, on the Villa Avenue crossing a warning system consisting of flash lights which flashed alternately upon the approach of a train, and a gong which rang at the same time the lights flashed.

A number of witnesses testified on the part of appellee that they did not hear the bell rung nor the whistle sounded, nor did they see the lights at the crossing flash or hear the gong sounded just prior to the collision or immediately before.

On the part of appellant there was considerable evidence offered to the effect that the bell had been ringing automatically and continuously since leaving a point about twenty miles west of the crossing; that the whistle blew practically continuously from a point about a quarter of a mile west up to the crossing and that the gong was ringing and the lights were flashing continuously before the accident~~te~~ and until after the accident had occurred.

There is no evidence in this record with respect to the conduct of the deceased before or at the time of the collision, except the testimony of one witness to the effect that such witness, driving at the rate of approximately 15 to 20 miles an hour south on Villa Avenue, when about a block north of the railroad crossing, passed a Ford automobile, moving at approximately the same rate of speed, going south on Villa Avenue, the wreck of which Ford automobile lying on the north side of appellant's railroad tracks such witness saw some time later when he returned to the scene of the accident. This witness further testified that he heard a crash north of him when he had reached a point on Villa Avenue about 25 feet south of the crossing. Other witnesses testified that they saw the same Ford automobile standing still upon appellant's railroad track at the

and appellant's railroad east and west; that the train which struck the deceased was moving in an easterly direction; that the deceased was driving a Ford car south on the west side of Villa Avenue; that the automobile in which the deceased was riding seemed to stop on the track and was there struck by the train and that there was, at the time of the collision, on the Villa Avenue crossing a warning system consisting of flash lights which flashed alternately upon the approach of a train, and a gong which rang at the same time the lights flashed.

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There is no evidence in this record with respect to the conduct of the deceased before or at the time of the collision, except the testimony of one witness to the effect that such witness, driving at the rate of approximately 15 to 20 miles an hour south on Villa Avenue, when about a block north of the railroad crossing, passed a Ford automobile, moving at approximately the same rate of speed, going south on Villa Avenue, the wreck of which Ford automobile lying on the north side of appellant's railroad tracks such witness saw some time later when he returned to the scene of the accident. This witness further testified that he heard a crash north of him when he had reached a point of Villa Avenue about 25 feet south of the crossing. Other witnesses testified that they saw the same Ford automobile standing still upon appellant's railroad track at the

instant when it was struck by the train of appellant.

It is contended by appellee that this evidence is sufficient to support the finding of the jury that deceased was in the exercise of due care at the time of the accident, and coupled with the testimony which tended to establish the fact that the statutory signals were not given and that the flash lights were not working was sufficient to warrant the jury in returning the verdict it did, which has had the approval of the trial court.

The appellant contends that the evidence discloses that it was guilty of no negligence toward the deceased and that even if it were, the contributory negligence of the deceased was a bar to a recovery.

The evidence is quite satisfactory that there was a continuing clear and unobstructed view of appellant's track for a considerable distance to the west of Villa Avenue from a point approximately 160 feet north of appellant's track on Villa Avenue and south from there continuously right up to appellant's track, nevertheless, without taking time to look to the west from which direction appellant's train was approaching, appellee's intestate drove his automobile south on Villa Avenue until the front or south end of said automobile had come upon appellant's track; that his automobile then suddenly stopped and while standing upon said track was struck by appellant's engine. In view of these facts, the question then arises, did appellee's intestate bring himself within the rule as to the exercise of due care as announced by the Courts of this State?

Burns vs. Chicago & Alton Railroad Co., 223 Ill. App. 439 was a crossing case and having been before the court on two different occasions (Burns v. Chicago and Alton Railroad Co., 229 Ill. App. 170), was reversed in each instance because the driver of the car at the crossing in question at the time of the collision was not in the exercise of due care and caution for her own safety. Each time

instant when it was struck by the train of appellant.

It is contended by appellee that this evidence is sufficient

to support the finding of the jury that deceased was in the exer-

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were not given and that the flash lights were not working and suf-

ficient to warrant the jury in returning the verdict it did, which

has had the approval of the trial court.

The appellant contends that the evidence discloses that it was

guilty of no negligence toward the deceased and that even if it were,

the contributory negligence of the deceased was a bar to a recovery.

The evidence is quite satisfactory that there was a continuing

clear and unobstructed view of appellant's track for a considerable

distance to the west of Villa Avenue from a point approximately 100

feet north of appellant's track on Villa Avenue and south from there

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south on Villa Avenue until the front or south end of said automobile

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cise of due care as announced by the Court in this case?

Burns vs. Chicago & Alton Railroad Co., 229 Ill. App. 459 was

a crossing case and having been before the court on two different

occasions (Burns v. Chicago and Alton Railroad Co., 229 Ill. App.

470), was reversed in each instance because the driver of the car

at the crossing in question at the time of the collision was not in

the exercise of due care and caution for her own safety. Each time

that this case was before the court numerous authorities were cited bearing upon the question of the duty of one approaching a crossing under circumstances similar to those disclosed by this record, and in the first review of this case in 223 Ill. App. 439, ^{at} page 442, the court announced the following rule: "It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this State that one who approaches a railroad crossing must approach it using an amount of care commensurate with the known danger."

In Chicago and Northwestern Railroad Co., vs. Hatch, 79 Ill. 137, the court approved an instruction announcing the following rule: "Every person is bound to know that a railroad crossing is a dangerous place and he is guilty of negligence unless he approaches it as if it were dangerous."

In Chicago & Alton Railroad Co. vs. Gretzner, 46 Ill. 74, at page 82, it was stated: "What is the testimony on the part of plaintiff's negligence? He knew, as all men are bound to know, such a crossing is a dangerous place and he should have approached it as such. This court has said it is the duty of persons about to cross a railroad to look ~~upon~~ about them and see if there is any danger, not to go recklessly upon the road but to take proper precautions themselves to avoid accident at such places."

In Toledo W & W Ry. Co. vs Jones, 76 Ill. 311, it was held: "There is nothing which can release a person from the duty of exercising due care and caution at a railroad crossing. It is not always the case that trains are on time as is well known, hence the pressing necessity of using diligent care and caution at all times."

In order to avoid the known and obvious danger ever present at this railroad crossing, the minimum requirement imposed upon the deceased was to make diligent use of his senses and to maintain a

that this case was before the court under the authorities were cited bearing upon the question of the duty of one crossing another under circumstances similar to those disclosed by this record, and in the first review of this case in 228 Ill. App. 435, 228 Ill. App. 435, the court announced the following rule: "It is a generally recognized fact that railroad crossings are dangerous places, and it is the settled law in this State that one who approaches a railroad crossing must approach it using an amount of care commensurate with the known danger."

In Chicago and Northwestern Railroad Co., vs. Hatch, 73 Ill. 137, the court approved an instruction announcing the following rule: "Every person is bound to know that a railroad crossing is a dangerous place and he is guilty of negligence unless he approaches it as it were dangerous."

In Chicago & Alton Railroad Co. vs. Freeman, 45 Ill. 74, at page 38, it was stated: "What is the testimony on the part of plaintiff's negligence? He knew, as all men are bound to know, such a crossing is a dangerous place and he should have approached it as such. This court has said it is the duty of persons about to cross a railroad to look well about them and see if there is any danger, not to be recklessly upon the road, but to take proper precautions themselves to avoid accident at such places."

In Toledo & W. Ry. Co. vs. Jones, 74 Ill. 211, it was held: "There is nothing which can release a person from the duty of exercising due care and caution at a railroad crossing. It is not enough the case that trains are on the road as it well known, hence the pressing necessity of using diligent care and caution at all times."

In order to avoid the known and obvious danger ever present at this railroad crossing, the minimum requirement imposed upon the deceased was to make diligent use of his senses and to maintain a

degree of control over his vehicle commensurate with the existing conditions. Such a duty the law casts upon all persons about to cross a railroad track, but there is no evidence in this record which tends to show that appellee's intestate immediately before and at the time of the collision met this requirement of the law, as there is no affirmative proof in this record as to the acts or conduct of deceased as he approached this crossing.

We are of the opinion that the evidence in this record fails to show that appellee's intestate was in the exercise of ordinary care and caution as averred in the declaration, and in view of this conclusion, it is unnecessary for us to discuss or consider any other question.

The judgment of the Circuit Court of DuPage County is reversed and the cause remanded.

REVERSED AND REMANDED

degree of control over his vehicle commensurate with the
existing conditions. Such a duty the law casts upon all drivers
intent to create a railroad track, but there is no evidence in
this record which tends to show that appellee's intestate im-
mediately before and at the time of the collision met this
requirement of the law, as there is no affirmative proof in
this record as to the acts or conduct of appellee as he approached
this crossing.
We are of the opinion that the evidence in this record fails
to show that appellee's intestate was in the exercise of ordinary
care and caution as averred in the declaration, and in view of
this conclusion, it is unnecessary for us to discuss or consider
any other question.
The judgment of the Circuit Court of Cook County is
reversed and the cause remanded.

REVEREND AND HONORABLE

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

Abstract

Opinion filed - May 22, 1933

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GENERAL NO.8620

APRIL TERM, A.D.1932

AGENDA NO. 6

ADA SCHULTZ,

Appellee,

vs.

PYRAMID MUTUAL LIFE INSURANCE
COMPANY,

Appellant,

ELDREDGE, P.J.

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(
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Appeal from
Circuit Court,
Vermilion County.

271 I.A. 612³

Appellee recovered a judgment in the court below for the sum of \$250.00 being the amount of a policy issued on the life of Edward Walker, deceased. It was contended that the policy was procured by fraud and misrepresentation on the part of the insured and the beneficiary in that the insured was not in sound health at the time it was applied for and on the date of the delivery thereof, and that the plaintiff had no insurable interest in the life of the insured; that the insured within two years of the date of the policy died from a cause originating before the policy was six months old; that the insured within two years from the date of the policy died of a disease, lobar pneumonia, a disease of the lungs which was a risk not assumed under the terms of the policy. The case originated before a police magistrate and the judgment was rendered in the Circuit Court on appeal therefrom. The policy contained the following provision:-

"It is understood and agreed that the company may make payment to any relative by blood or connection by marriage or to any person appearing to the company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured for his or her burial or for any other purpose, etc."

Appellee paid the expenses of the funeral.

The doctor who attended the deceased in his last illness testified that the insured died from pneumonia resulting from influenza and that in his best judgment the insured did not at any time have any pulmonary disease, chronic bronchitis, cancer or any disease of the heart, liver or kidneys. It appears that there is evidence tending to support appellee's cause of action under the policy and the jury took that view of the case. There was no substantial error in the admission or exclusion of evidence or in the instructions of the Court and the judgment of the Circuit Court is therefore affirmed.

Defension Filed. May 22, 1933

AGENDA NO. 29

A. F. DOUGHERTY,

Appellee,

VS.

JOHN P. BROWN,

Appellant.

Appeal from
Circuit Court,
Logan County.

ELDREDGE, P. J.

271 I.A. 612⁴

This is an action of replevin to recover a diamond claimed to be owned by appellee. The jury returned a verdict finding the issues in favor of appellee, on which verdict judgment was entered. About 1:30 o'clock on the morning of January 20, 1931, appellee was awakened in his home by someone knocking on the door of his house. He opened the door and two men came in who ordered him to hold up his hands and proceeded to rob him of various things, among which was a diamond ring. One of these men appellee identified as a man by the name of Al Wehr. Appellee had known Wehr for thirty years in the City of Lincoln where both he and Wehr lived. In the forenoon of the following day appellant, John P. Brown, entered a jewelry store in Springfield, Illinois and told a clerk therein that he wanted to buy a mounting and wanted to know the value of the stone and weigh it. He was informed of its value and selected a heavy mounting of white

gold, bold type and fancy engraved. The mounting was identified by the clerk. The evidence showed that the fair, cash, market value of the diamond was \$1200.00 and that its weight was 2.16 carats or 2.06 2/3 under the metric system. Appellant produced a purported receipt signed by Wehr dated January 18, 1931 for the sum of \$225.00 payment for one diamond. Wehr lived in Springfield near appellant but was not produced as a witness. Appellant claimed that Wehr owed him a bill for taxi rental and that he took the ring in payment thereof and gave Wehr the balance in cash. There is some conflicting evidence as to the identity of the diamond produced on the trial and the one owned by appellee. The only error assigned is that the verdict is contrary to the manifest weight of the evidence. The jury saw the witnesses and heard them testify and there is ample evidence in the record to sustain the verdict.

The judgment of the Circuit Court is affirmed.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
FEBRUARY TERM, A. D. 1935.

TERM NO. 4.

AGENDA NO. 10.

271 I.A. 613¹

JOHN L. CULBRETH,
Appellee

vs.

BOARD OF EDUCATION,
DISTRICT 104, MADISON
COUNTY, ILLINOIS.
Appellant.

APPEAL FROM

CIRCUIT COURT OF

MADISON COUNTY.

BARRY, P. J.:

Appellee was first employed by appellant in 1929. On June 11, 1930 he was employed as a janitor and truant officer for the year beginning July 1, 1930, at a salary of \$160.00 per month. On August 11, 1931 a motion was duly adopted that the Board of Education re-employ all present janitors for the ensuing year and at present salaries. Pursuant to that motion appellee continued to perform his usual duties until November 30, 1931 and was paid the stipulated salary up to that time. He was discharged because he filed a petition in bankruptcy, being unable to pay his creditors. The undisputed evidence is that during his entire service his duties were repair work, errands for the superintendent, plumbing, carpenter work, hauling freight, and when children were absent from school he would investigate as to the cause of their absence; that the making of such investigations consumed about one hour per day of his time. At times he did some scrubbing, sweeping, dusting, mowing grass and removing snow from the walks. Appellee sued and

TERM NO. 4.

recovered a verdict and judgment for \$700.00.

Appellant insists that appellee was not employed as a janitor and for that reason was not entitled to recover. That even if he was so employed appellant, on May 10, 1932, amended its minutes of August 11, 1931 so as to show that the janitors were re-employed for the ensuing year, or until further order of the Board. The evidence does not show that there was any basis for that amendment and it was made on the day this suit was begun. After appellee was employed on August 11, 1931 he performed the same duties as he had been performing since 1929 until his discharge. Under the evidence in the record appellee was entitled to recover, there was no defense to his claim, and it is unnecessary to consider the alleged errors urged by appellant. The judgment is right and is affirmed.

AFFIRMED,

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
FEBRUARY TERM, A. D. 1935.

TERM NO. 11.

AGENDA NO. 16.

RICHARD RIPPLEY,
Appellee,
vs.
REILLEY BROTHERS,
A CORPORATION.
Appellant.

APPEAL FROM
CIRCUIT COURT OF
MADISON COUNTY.

271 I.A. 613²

BARRY P. J:

Appellant sold appellee a car on a conditional sales contract and then assigned the contract to a finance company. Appellee paid \$145.00 in cash and agreed to pay \$40.20 each month for twelve months. He made seven of those payments to appellant who turned them over to the finance company. The car was damaged in an accident and appellee employed appellant to make the repairs. Possession of the car was delivered to appellant for that purpose and when completed appellee paid \$300.00 for the repairs. Appellee says that when he learned the repairs had been made and after he had paid the bill, he told Harvey Reilley, on November 19, 1931, that in a few days he would come in and pay \$201.00, the balance of the purchase price, and that Mr. Reilley told him that would be satisfactory. Two days later appellant sold the car to Charles Purcell without the knowledge or consent of appellee. On November 23 appellee called at appellant's office, told Mr. Reilley he had the money, offered to pay him and told him he wanted to get his car. Mr. Reilley replied that the car was gone, that two men from St. Louis had taken

TERM NO. 11.

it away. Appellee was unable to locate his car until March 1932, when he found it in the possession of Mr. Purcell who had bought it from appellant on November 21, 1931 for \$450.00. He then sued appellant and recovered a verdict and judgment for \$349.00.

Mr. Reilley testified that in the latter part of October Mr. Miles, of the finance company, told him to consider the car repossessed. Mr. Miles says that not later than November 5, he gave appellee five days to raise the money and when that time expired he repossessed the car but he does not state what he did in that regard. Presumably he told Mr. Reilley to consider the car as repossessed. The car was in the possession of appellant as the bailee of appellee and was never out of its possession until it was sold to Mr. Purcell on November 21.

Mr. Reilley testified that appellant re-acquired the car some time in November and offered in evidence a re-assignment of the contract to appellant from the finance company which bears no date. There is no evidence as to when it was executed and there is no showing as to when appellant paid the balance due the finance company. It is a reasonable inference from all the evidence that appellant had the re-assignment of the contract on November 19th when Mr. Reilley told appellee it would be satisfactory if he paid the balance in a few days.

Appellant concedes that under the terms of the contract appellee had the right to pay the balance due within ten days after the car was repossessed and upon doing so the car was to be his. Appellee offered to pay the balance on November 23rd and was told the car had been taken away by two men from St. Louis, which was not the fact. If it can be said that the car was ever repossessed there is no evidence as to when the change in possession

TERM NO. 11.

occurred or that appellee had any notice thereof. Under the evidence the jury was fully warranted in finding that appellee was entitled to recover.

Appellant argues that there is no competent evidence as to the value of the car on November 21. Appellee testified, without objection, that after the repairs were made the value of the car was \$565.00. He also says that when he paid appellant \$300.00 for repairs Mr. Reilley told him that the car was then practically as good as when he bought it and was a better car. Mr. Cornish testified that he had bought three used cars in the market and when asked as to the value of this car, the only objection was that it was not the proper measure of damages. The witness said the car was worth about \$565.00. There was no objection to the effect that either of these witnesses was not qualified to express an opinion as to the value of the car.

This suit was begun before a Justice of the Peace against Harvey Reilley and Phillip Reilley as partners. The summons was amended so as to make Reilley Brothers, a Corporation, the defendant. The title of the case and the return on the summons were also amended and a judgment was rendered against Reilley Brothers, a Corporation. At the trial in the Circuit Court, appellant filed a written denial to the effect that the name of the defendant was not Reilley Brothers. There was no denial as to the name of Reilley Brothers, a Corporation. Appellant is in no position to contend that the judgment should be reversed because its true name is Reilley Brothers, Inc. No reversible error has been pointed out and the judgment is affirmed.

AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1933.

TERM NO. 19.

AGENDA NO. 22.

271 I.A. 613³

OSCAR LIESE, et al,)	
Defendants in error,)	APPEAL FROM
)	
VS.)	CIRCUIT COURT OF
)	
JACOB HELFRICH, et al,)	ST. CLAIR COUNTY.
Plaintiffs in error.)	

BARRY, P. J:

Plaintiffs in error filed a motion and affidavits to open a judgment by confession and for leave to plead. A motion to strike the same from the record was allowed and the only question argued by plaintiffs in error is that the Court erred in striking the motion, affidavits and pleas from the files. There is no bill of exceptions and we are not permitted, under the law, to consider the question urged. Affidavits in support of a motion to open a judgment and for leave to plead are not a part of the record so as to be considered on appeal, unless they are preserved in a bill of exceptions; Davis v. Wirth, 249 App. 544; Anderson Transfer Co., v. Fuller, 174 Ill. 221. In the state of the record there is no question presented that we can consider and the judgment is affirmed.

AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS,
APPELLATE COURT
FOURTH DISTRICT.
FEBRUARY TERM, A. D. 1933.

TERM NO. 2

AGENDA NO. 9.

271 I.A. 613⁴

W. R. MCKERNON,
Plaintiff in Error,

ERROR TO

vs.

CIRCUIT COURT OF

Arvilla S. Smith, et al.,
Defendants in Error.

GALLATIN COUNTY.

EDWARDS, J.

Plaintiff in error filed a creditor's bill in the Circuit Court of Gallatin County, averring that on April 7, 1926, in said court, one Joseph Smith recovered a judgment for \$5,000.00 and costs, against Arvilla S. Smith, one of the defendants in error; which judgment he afterward became the owner of. It is further alleged that two executions, dated June 16, 1926 and March 12, 1931, were issued on such judgment, both of which were returned unsatisfied; that said judgment still remains in full force and unsatisfied and that said Arvilla S. Smith has no property which is subject to execution.

The bill further charges, on information and belief, that Arvilla S. Smith has a consummate dower interest in and to 470 acres of land in said county, owned by Verginius W. Smith, her husband, in his lifetime, and who died intestate on February 25, 1931, leaving him surviving said Arvilla S. Smith, his widow, and the other defendants in error, his children and grandchildren; that administration was duly had on his estate, but that the widow refuses to have her dower in said lands assigned.

It is further averred that on February 15, 1927, Arvilla S. Smith conspired with her husband, for the purpose of defeating

the collection of complainant's judgment; that on such date she joined her said husband in deeds of conveyance of such lands, to said children and grandchildren; that such deeds were, in fact, without consideration, and for the sole purpose of hindering and delaying the collection of the complainant's judgment.

Further, the bill sets forth that Arvilla S. Smith, since the rendition of said judgment, has put out of her hands divers real and personal property, with intent to defraud said complainant out of his judgment; all of which are held in secret trust for her benefit; and that among the persons so holding same, are the other defendants in error; or else that such last mentioned persons have property in their names or control, subject to some lien, in which Arvilla S. Smith has some interest or equity of redemption, or that some of said parties are indebted to her.

Prayer was for discovery as to such concealed assets; that the deeds of conveyance may be decreed to be void, and cancelled, so far as they affect the rights of the complainant, and that whatever rights or interest, conveyed in said deeds to the grantees, may be declared subject to the dower rights of Arvilla S. Smith; and that such dower be subjected, under the direction of the court, to the satisfaction of complainant's judgment.

To the bill/^{was} filed a general, and two special, demurrers; one of the specified grounds being that the bill, on its face, shows that Mrs. Smith had only an inchoate right of dower in the lands in question at the time the judgment was obtained, and that it fails to show any property belonging to her, that would be liable to levy under an execution, or sale, under a creditor's bill. The court sustained the demurrers. Plaintiff in error elected to stand by the bill, which was dismissed for want of equity, and this writ of error was sued out to review the decree of dismissal.

Defendants in error take the position, that the only interest shown by the bill, to the lands in question, was an inchoate right of dower, which was not susceptible of conveyance, or subject to sale under execution, and the same could not be reached by creditor's bill.

In *Bennett v. Bennett, et al.*, 318 Ill., 193, the Supreme Court, in discussing the character of the inchoate right of dower, states that such right, "before it has been consummated by the husband's death, is a mere intangible, contingent expectancy, and not only is not an estate in land, but does not even rise to the dignity of a vested right;" while in *Virgin v. Virgin, et al.*, 189 Ill., 144, the rule is stated to be that in this state, a wife whose husband is living, has a mere inchoate right of dower, - an expectancy, which does not vest or become property until the husband's death.

The well considered case of *Witthaus v. Schack*, 11 N. E. R., 649, (N. Y.), discusses the law pertaining to this subject, and states that "the settled theory of the law, as to the nature of an inchoate right of dower, is that it is not an estate or interest in land at all, but is a contingent claim arising, not out of contract, but as an institution of law, constituting a mere chose in action, incapable of transfer by grant or conveyance, but susceptible only, during its inchoate state, of extinguishment. By force of the statute, this is affected by the act of the wife in joining with her husband in the execution of the deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest, and not as a conveyance, and removes an incumbrance, instead of transferring an interest or estate."

It thus appears clear that the only interest that Arvilla S. Smith had in the lands in question, both when the judgment was rendered, and when the deeds were executed, was a mere expectancy,

TERM NO. 2.

and that her right at such time was not "an estate in land," and "did not even rise to the dignity of a vested right." Mrs. Smith's creditor surely could have no greater rights in the land than had she. A wife's inchoate right of dower cannot be reached by a creditor's bill. 19 Corpus Juris, 494.

Defendants in error further urge, as ground for sustaining their general demurrer, that the bill fails to aver the insolvency of Arvilla S. Smith at the time of the alleged transfers or conveyances, or that in consequence of same, she was left without sufficient funds or property to satisfy the judgment of complaint. The bill is wholly devoid of any averment that Mrs. Smith was insolvent, or had no property that was subject to levy of execution, either at the dates of transfer or when the executions were in the sheriff's hands. The only allegation as to her solvency, was that she had no property which could be reached by execution, - referring to the date of filing the bill.

To impeach voluntary conveyances or transfers, it is incumbent upon the complainant to aver and prove that he was a creditor at the time, and that the grantor or transferor was then insolvent, or was made so by the transaction. State Bank of Clinton v. Barnett, 250 Ill., 312, and cases cited.

The averment of such insolvency, being a necessary element of complainant's case, must be alleged, otherwise the complaint fails to state a ground for relief. Here, such essential averment was lacking, hence the bill was obnoxious to the demurrer.

DECREE AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
FEBRUARY TERM, A. D. 1933.

TERM NO. 6.

AGENDA NO. 24.

CHARLES BROWN, ASSIGNEE OF LOTTIE SMITH,
Appellee,

VS.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY,
Appellant.

APPEAL FROM

CITY COURT OF

EAST. ST. LOUIS.

271 I.A. 613

EDWARDS, J:

On August 24, 1929, the appellant, National Life & Accident Insurance Company, issued its policy of insurance upon the life of Argo Smith, in the sum of \$300.00, in which Lottie Smith was named beneficiary.

On September 24, 1929, Argo Smith died, and his beneficiary brought suit upon the policy before a justice of the peace, where she recovered a judgment for \$300.00. Appellant appealed the case to the City Court of East St. Louis, where, during its pendency, appellee Charles Brown, as assignee of the beneficiary named in the policy, was substituted as party plaintiff.

Two trials were had in the City Court, in both of which verdicts for the face of the policy were rendered in favor of appellee; the first of which the Court set aside and awarded a new trial. Upon the second, judgment was entered in his favor, in the sum of \$300.00 and costs, from which appellant has perfected this appeal. At the latter trial, appellant moved, at the close of plaintiff's case, and at the conclusion of all the evidence, for a directed verdict. Both motions were overruled.

One of the reasons assigned for such motions was that at the time appellee was substituted as party plaintiff, he had no affidavit on file, as required by Sec. 18, Ch. 110, of the Revised Statutes, stating that he was the bona fide owner of the cause of action under the insurance policy, and how and when he became owner of the same; also, that no such affidavit has at any time been filed in the cause. An examination of the record discloses that no affidavit of that character was ever filed by appellee.

By the terms of said Sec. 18, Ch. 110, R. S., it is provided that the assignee, and bona fide owner of a non-negotiable chose in action, may sue thereon in his own name, and he shall in his pleading, or by his affidavit (where pleading is not required), aver that he is the actual bona fide owner thereof, and set forth how and when he acquired title.

Compliance with such requirements of the statute have been held to be conditions precedent to the maintenance of a suit by the assignee, and not merely directory provisions; that the statute, being in derogation of the common law, a strict compliance with its terms is indispensable. *Leemon v. Grand Crossing Tack Co.*, 187 Ill. App., 247. *Fingado v. Wilson Braiding & Embroidering Co.*, 205 Ill. App., 267.

One of the exactions of the Act is that where written pleadings are not required, the assignee, by affidavit, shall set forth that he is the actual bona fide owner of the cause of action, and how, and when, he became such.

This suit was started before a justice of the peace, hence written pleadings were not necessary. It was therefore incumbent upon the assignee to establish such facts by his affidavit, otherwise he could not maintain his suit.

TERM NO. 6.

The filing of such affidavit being one of the essential conditions upon which the suit could be sustained, and appellee having failed to supply such, he was not properly in court as the assignee of the cause of action. There was no legal basis upon which the suit, or the resultant judgment, could rest.

The court erred in overruling the motion of appellant for a directed verdict; for which reason the judgment is reversed.

JUDGMENT REVERSED.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1933.

TERM NO. 24.

AGENDA NO. 6.

271 I.A. 614¹

CHARLES AGLES,
Plaintiff in Error,

vs.

STOLZE LUMBER COMPANY, et al.,
Defendants in Error.

ERROR TO

CIRCUIT COURT OF

MADISON COUNTY.

EDWARDS, J:

On November 27, 1929, in a proceeding to foreclose a mechanic's lien upon property owned by W. W. Haven, the Stolze Lumber Company, (at that time a partnership), secured a decree, awarding them a lien upon the property in the sum of \$4,040.70, and directing a sale to satisfy the claim, which was for building materials sold by them to O. T. Bigham, a general contractor, and used by him in constructing a building upon the premises.

Plaintiff in error, Charles Agles, was a sub-contractor who furnished labor and materials for the structure, under contract with Bigham, to the extent of \$1,735.00. Agles was made a party defendant to the proceeding, and filed his answer.

After a hearing before the Master in Chancery, the Chancellor confirmed the report of the Master, and entered a decree to the effect that said Stolze Lumber Company had a lien as aforesaid. The court further found that Agles was entitled to recover from Bigham the said sum of \$1,735.00, for labor and materials, but also found, specifically, that Agles was not entitled to a mechanic's lien against the property, for the reason that he had failed to personally serve upon Haven,

TERM NO. 24.

the owner of the premises, a written notice of his claim for lien, as required by the statute.

Agles sued out a writ of error in the Supreme Court, to review such decree. The cause was by the latter tribunal transferred to this court, where the decree was affirmed. *Agles v. Stolze Lumber Co., et al.*, 260 Ill. App., 14.

The affirmance order having been filed in the office of the Clerk of the Circuit Court, the Master in Chancery proceeded to execute the decree by advertising and selling the property as required. At the sale the Stolze Lumber Company, (which in the meantime had become a corporation), was the best bidder, and became the purchaser of the premises. The Master's report of sale was confirmed by the court, and conveyance ordered to the Stolze Lumber Company. This was at the March, 1931, term of the Circuit Court.

One year later, at the March 1932, term of such court, Agles filed a motion in said cause, praying that the same be re-docketed, and the original decree re-opened, so as to fully adjudicate his rights; and further praying that the decree be set aside. The court ordered the cause re-docketed; afterwards denied the motion, and entered a decree finding that Agles' rights had been fully adjudicated by the original decree, and that same, having been affirmed by this court, was res adjudicata. Agles now prosecutes this further writ of error in the cause, claiming that he is entitled to a lien upon the property in question, and that the court erred in ordering the premises sold free and clear of his claim.

The former decree found specifically that while Agles had a claim against Bigham for the labor and the materials which he furnished, yet he had no lien against the property because he

TERM NO. 24.

had failed to serve Haven, the owner, with a written notice of his claim for lien. This was a final adjudication of the question so to whether he had a lien against the property, or a right to sell same to satisfy the claim, and having been affirmed by this court, and our decision having in nowise been reversed or set aside by the Supreme Court, was final and binding upon the parties, and settles the question so that it cannot be further litigated. *Tribune Co. v. Emery Motor Livery Co.*, 338 Ill., 537. Moreover, a second appeal can only bring up matters arising subsequent to the former appeal, for the obvious reason that a party will not be permitted to have his case heard, partly at one time, and partly at another. *Jackson v. Glos, et al.*, 249 Ill., 388. All that appears in the cause, since the affirmance by this court of the original decree, is the sale of the property by the Master, the approval of same, the motion of plaintiff in error to set aside the original decree, and the court's order denying such motion.

The motion does not ask that the sale be set aside, nor claim any inequality in the making of same, nor that the Master failed to comply with the terms of the original decree in making such sale. Plaintiff in error's only claim, if we understand his motion correctly, is that the original decree be set aside, to the end that the question^{of} whether he has a lien against the premises, can be re-litigated. This question, as we have seen, is res adjudicata, and not subject to further controversy.

We think the Chancellor was right in denying the motion, and his action in so doing will be affirmed.

DECREE ~~##~~AFFIRMED.

Not to be reported in full.



STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1933.

TERM NO. 5.

AGENDA NO. 11.

PROTECTIVE SAVINGS AND
LOAN ASSOCIATION,
Appellant

vs.

INDEPENDENCE INDEMNITY
COMPANY,
Appellee.

APPEAL FROM

CIRCUIT COURT OF

ST. CLAIR COUNTY.

271 I.A. 614²

FULTON, J:

This appeal is prosecuted from a judgment of the Circuit Court of St. Clair County, entered upon the sustaining of Appellee's demurrer to the second amended declaration of Appellant. Neither in Appellant's statement of the case nor in the Abstract of Record can be found any ruling or judgment of the Court upon the demurrer, and while it is not incumbent upon the Court to search the record for reversible error, it is ascertained in this case that on pages 30 and 31 of the record, the Circuit Court did sustain the demurrer to Appellant's second amended declaration: that Appellant elected to stand by its said amended declaration and that the Court entered judgment in bar of the action and against the Appellant for costs.

The declaration is based upon a fidelity bond issued by Appellee to Appellant, covering one Gova B. Pearson, an employee of Appellant, under which it is claimed that Appellant suffered a pecuniary loss by reason of the acts of fraud and dishonesty of Pearson. It alleges the issuance of the bond on May 20, 1924, and continuations of same up to May 20, 1927. It also alleges that on or about December 16, 1926, Gova B. Pearson, while an officer and employe of Appellant, secured

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the approval of Appellant to an application from Bertha Mae Bottom for a loan of \$800.00: that thereafter Pearson fraudulently and dishonestly altered the application so as to make it read \$2800.00, and the transaction went through on the books of Appellant to show the loan was approved for \$2800.00: that thereafter as a result of the fraudulent and dishonest acts of Pearson, the sum of \$2800.00 was withdrawn from the funds of Appellant and converted to the use of Goya B. Pearson and thereby Appellant sustained a loss in excess of the sum of \$1500.00, the maximum liability on the bond. It was further alleged that the loss was discovered within the two years allowed by the bond: that immediately thereafter notice was given "in the form of a letter sent to the home office by Bockwith Brothers Company, through whom, acting in behalf of the Appellee, said bond had originally been procured by Appellant". The notice read as follows:-

"May 1st, 1929,

Independence Indemnity Company,
Philadelphia, Pennsylvania.

Gentlemen:

On May 20th, 1924, you issued a surety bond through the agency of Muckerman and Cushman of St. Louis, Missouri, covering Savings and Loan Association. This bond was G. B. Pearson as Secretary of the Protective in favor of the State of Illinois. The number of this bond is S. A. 2648 and was renewed by continuation certificate for one year beginning May 20th, 1925, and again renewed under Certificate St. L. 383 for the year ending May 20th, 1927, for Fifteen Hundred Dollars (\$1500.00).

Your are hereby notified that there will be a claim

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made for the full amount of this bond.

Yours very truly,

Beckwith Bros. Co.

By _____."

The declaration further avers that the following reply was received by Beckwith Bros. Co.:

"Independence Indemnity Company"

Home Office, Philadelphia

Charles H. Holland, President.

Beckwith Brothers Co.

320 Missouri Avenue,

East St. Louis, Ill.

Gentlemen:

Re: Claim No. 5971-Gova B. Pearson
Protective Savings & Loan Association,
Missouri.

I have your letter of May 1st referring to a bond covering Gova B. Pearson and in favor of Protective Savings and Loan Association, but as you failed to disclose your connection with the matter or advise us if you are acting in behalf of the Obligee, we cannot accept this letter as any notice under the terms of our bond.

Very truly yours,

A.W. Seymour, Attorney."

It further avers that Appellee refused to fulfill its obligations under said bond as shown by the following letter to the attorney for Appellant:

"Independence Indemnity Company

Home Office, Philadelphia

Charles H. Holland, President

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J. P. Drury, Esq.,

Arcade Building

East St. Louis, Ill.

Dear Sir:

Re: Protective Savings & Loan Association.

Receipt is acknowledged of your letter of May 20th, with which you enclosed what you term a proof of loss with reference to an alleged irregularity in the discharge of the duties on the part of Gove B. Pearson.

We are returning this document to you and beg to advise that we are unable to recognize liability under the above mentioned bond for such loss as your client, Protective Savings and Loan Association, may have sustained by reason of the facts set forth in what you have designated as a Proof of Loss.

If you will examine the bond which your client held, and which was terminated in May, 1927, you will readily understand why we are unable to accept liability in this instance.

Very truly yours,

Walter Caples, Attorney."

The declaration then avers that by reason of such wrongful refusal to accept said notice of loss and refusal to carry out its obligations under the bond that Appellee waived compliance with the terms of said bond on the part of Appellant. The bond was copied in the declaration and contained the following clause:

"1. Loss, if any, shall be discovered not later than two years after the termination of this insurance: notice shall be delivered to the surety to the address printed at the head

TERM NO. 5.

of this bond, as soon as possible after the employer discovers that a loss has been sustained hereunder, and within 90 days after the date of such notice, the employer shall file with the surety the employers sworn itemized claim hereunder. No suit, action or proceeding shall be brought against the surety by the employer in respect to such claim after the expiration of 12 months after the delivery of such claim."

The sufficiency of the declaration was challenged by demurrer upon several different grounds, one of which seemed to be sufficient. In the notice of loss sent to Appellee by Beckwith Brothers Co. there is nothing to show their connection with the claim but even though that letter might be construed as notice, there is no allegation that itemized claim was ever furnished as required by the terms of the bond. Appellant contends that such requirement was waived by Appellee because of its wrongful refusal to accept notice or claim of loss. In the suit of Fray v. National Fire Insurance Co. 341 Ill. 431, the Court said: "The rule is settled that an insurance company may, through its agent, waive proof of loss without the use of express words. This may be done by his acts and conduct inconsistent with an intention to enforce strict compliance with the conditions of the policy, which conduct is calculated to lead the insured to believe that the company did not intend to require such compliance".

Under the allegations of this declaration it seems to us there was every evidence that Appellee would insist upon strict compliance with the terms of the bond and the letter written by Appellee cannot be construed as conduct inconsistent with an intention to enforce such compliance. Under our view

TERM NO. 5.

of this declaration there is no fact alleged which would constitute a waiver and therefore the declaration lacks one of the essential elements necessary to state a cause of action on this bond. The Circuit Court properly sustained the demurrer to Appellant's declaration and its judgment is hereby affirmed.

AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1933.

TERM NO. 13.

AGENDA NO. 2.

271 I.A. 614³

J. F. GILLHAM, EXECUTOR OF THE
LAST WILL AND TESTAMENT OF
FRED C. GILLHAM, DECEASED,
Appellee

APPEAL FROM

VS.

CIRCUIT COURT

OF MADISON COUNTY.

COUNTRY CLUB REAL ESTATE
IMPROVEMENT COMPANY, A
CORPORATION, Appellant.

FULTON, J:

Fred C. Gillham, during his lifetime, and prior to December 19, 1927, signed the following agreement:-

"I, the undersigned, hereby agree with the Corporation hereinafter mentioned and with each and all of the others who subscribe to a like contract, to take 30 shares of stock at the par value of \$100.00 each of the capital stock of a corporation to be organized under the laws of the State of Illinois under the name of Country Club Real Estate Improvement Company, or other appropriate name, and I do further agree to pay the par amount of said shares of stock to said corporation upon the incorporation thereof, as follows: \$500.00 in cash and the balance with my note, with interest at 6% after January 1, 1929, payable in such installments from time to time as shall be determined by the Directors thereof.

"The purpose of said Corporation to be organized, shall be to purchase, improve and lay out as a residential park following the general plan of the blue print submitted herewith, the

TERM NO. 13.

property commonly known as the Country Club of Decatur, Illinois, with possession not later than January 1st, 1929, free and clear of incumbrances and material defects of title, except as to special assessments for local improvements, said premises to be subdivided into approximately 85 lots which shall be fairly appraised on an average valuation of \$3500.00 per lot, more or less.

"And I further agree to select one of said lots and the said corporation shall accept my said stock in payment thereof, and I will pay the difference for any such lot appraised for more than \$3000.00, and said corporation shall give credit for the difference on my said note for any lot selected of less value than \$3000.00. If more than one member desires a particular lot then said lot is to be auctioned to the highest bidder with the appraised value as a minimum price, or the selection determined in such other manner as said corporation may determine.

"This subscription shall not be binding until the subscriptions shall amount in the aggregate to \$150,000.00, and further, unless the premises mentioned can be purchased for not more than \$2000.00 per acre.

"Application for incorporation may be signed by any three or more of the subscribers and subscriptions shall be deemed to be accepted by said Corporation immediately upon the filing and recording of the Certificate of Incorporation thereof in the manner proscribed by law. Subscriptions shall be held by William Barnes Jr. pending application and the securing of incorporation, after which said subscriptions shall be delivered to the corporation.

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"It being further understood that immediately upon the incorporation of said company that said corporation and its duly authorized officers and directors shall work out the practical manner following the general plan heretofore mentioned, of accomplishing the purposes herein and the sale of any of the building sites not originally disposed of.

"Separate copies of this agreement may be signed with the same force and effect as though all the signatures were appended to one original instrument, provided however, that the obligation hereof is several and not joint.

F. C. Gillham (Seal)"

On December 19, 1927, the Appellant was incorporated with an authorized capital stock of \$50,000.00. On December 30, 1927, Fred C. Gillham paid \$500.00 to Appellant and thereafter on February 23, 1928, signed and delivered to Appellant Company his promissory note in the sum of \$2500.00, payable January 1, 1929, with interest at six per cent from maturity, which is the note in controversy. Subsequently Fred C. Gillham died and his last Will and Testament was duly admitted to Probate in Madison County, and appellee appointed Executor thereof. A claim was filed against said Estate by Appellant in the Probate Court, based upon said \$2500.00 note within one year after letters were issued and before hearing was had on same, a bill for injunction was filed by Appellee in the Circuit Court of said County to restrain the prosecution of said claim in the Probate Court. The bill alleged that Appellee claimed certain defenses that could not be availed of in the Probate Court. A temporary injunction was granted, after which Appellant filed its answer, and later substituted an amended answer denying that

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the defenses alleged to the note could not be made in the Probate Court. Certain portions of the amended answer were excepted to and were stricken. Appellant was ruled upon to answer further but declined so to do, and elected to stand by its amended answer whereupon a decree pro confesso was entered against Appellant and a permanent injunction awarded restraining prosecution of the claim on said note in the Probate Court of Madison County. This Appeal is prosecuted to reverse said decree of the Circuit Court.

The controlling question involved is whether Appellant should be permitted to prosecute its claim on the note in the Probate Court and the propriety of the Circuit Court to issue the restraining order contained in said decree.

In the Bill of Complaint Appellee alleges that the agreement above set forth is void because of the ultra vires acts provided for on the part of Appellant Company; because the note in question is based upon a void agreement; because of a want of consideration and similar defenses which he insists require the aid of a Court of Equity and cannot be determined by the Probate Court.

The Constitution of Illinois, Article 6, Section 18, provides that Probate Courts "shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons" etc, and the Administration Act provides that "County Courts shall have jurisdiction in all matters of probate, settlement of Estates of deceased persons" etc. Our Courts have many times recognized the rule that probate courts have equitable jurisdiction in all matters pertaining to the administration of Estates. In Re Estate of Mertz, 246 Ill. App. 283, In Re Estate of Kinsey, 261 Ill. App. 481, Trego vs. Estate of Cunningham,

TERM NO. 13.

267 Ill. 367. In the latter case on page 374 the Court said:-

"To avoid the delay, expense and embarrassment in the settlement of estates by requiring a resort, in the first place, to a court of equity, it will proceed in a case of an equitable character as though a bill in Chancery has been filed, and will hear the evidence, investigate the claim and apply equitable rules in determining the judgment. (Moore v. Rogers, 19 Ill. 347; Dixon v. Buell 21, Ill. 203; Heward V. Slagle, 52 Ill. 336; Wadsworth v. Connell, 104 Ill. 369; Thomson v. Black, 200 Ill. 465) In such a case the court will act substantially as a Court of equity, disregarding mere matters of form and looking to the substance to determine the equities of the parties". To the same effect is the case of Foreman State Trust and Savings Bank V. Tauber, 348 Ill. 280. While it does not follow that Probate Courts possess equitable jurisdiction in all classes of cases, and while that court is without general chancery jurisdiction, there is nothing in the defenses claimed by Appellee that could not be interposed in the trial of this claim in the Probate Court.

It is the judgment of this Court therefore that the Circuit Court of Madison County was without jurisdiction to entertain the Bill of Complaint in this case and the decree of that court will for the reasons assigned be reversed and the cause remanded with directions to vacate said decree and dismiss the bill for want of equity.

REVERSED WITH DIRECTIONS.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
FEBRUARY TERM, A. D. 1932.

Filed 5-29-32

A

TERM NO. 16.

AGENDA NO. 8.

271 I.A. 614⁴

MADA WOOD,
Appellee

VS.

CRAWFORD COUNTY MUTUAL
RELIEF ASSOCIATION,
Appellant.

APPEAL FROM CIRCUIT COURT

OF CRAWFORD COUNTY.

FULTON, J:

On November 19th, 1928 Ferd Wood made application for a policy of insurance to the Appellant Company. The application was accepted and a benefit certificate issued naming his wife, Mada Wood, the Appellee, as beneficiary. Insured died on January 5th, 1929 and suit was instituted by Appellee to recover the indemnity stipulated in the certificate.

Appellant filed the general issue and one special plea to the declaration. The special plea alleged that the insured made false statements as to the conditions of his health; that he knew them to be false at the time they were made and that they were made for the purpose of defrauding Appellant; that he stated that he had not suffered from any of the following diseases: Fits, Epilepsy, Syphilis, Mental infirmities, Heart disease, Bladder or Kidney trouble, when, in fact, he was then suffering from heart disease and kidney trouble. There was a trial before a jury, a verdict for Appellee for \$880.00; a motion for new trial denied; judgment was entered on the verdict and this is an appeal by Appellant to review said judgment.

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Appellant sought to prove the allegations of the special plea by introducing in evidence the application for policy representing that applicant was in good health and had never suffered from the diseases listed above, and also the testimony of Mr Taylor, who testified that Ferd Wood came to his office on December 20th, 1928 suffering from arterio sclerosis, mitral stenosis and hepeticized liver, also albumin in urine; that he was suffering from vicious circle caused by ailments or afflictions enumerated; and that in his opinion he had been suffering from them over a year and had them on November 19th, 1928. Dr. Elmore, the family physician who attended him in his last illness, testified that he treated him in September, 1928 and that at the time he had leaky heart and kidney trouble and had these diseases for eight or ten months prior to his death.

To meet and overcome this evidence Appellee offered in evidence the death certificate issued by Dr. Elmore, which stated the cause of death was leaky heart following flu. Duration one month. Also the testimony of the Appellee, Mada Wood, and her son, Otto Wood, both of whom testified that Ferd Wood was in good health at the time of signing the application; that he was engaged in general farm work and worked every day; that on the date in question he was actually engaged in fixing a fence on his farm and that he was never heard to complain of any of the diseases mentioned in the application.

It is urged that the court erred in permitting the Appellee, wife of the decedent to testify to facts which she must have gained knowledge of by means of the marriage relation. At common law the rule prohibited a wife from being a witness for or against her husband as to any matter. Nor could

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she, either during the marriage or after its termination by death or divorce, be a witness to testify to communications between them or to any fact or transaction the knowledge of which was obtained by means of the married relation.

The rule has been modified in Illinois by sections one and five of the Evidence Act, but neither of these sections renders the wife a competent witness except in the cases enumerated in said Section five. Schreffler vs. Chase, 245 Ill. 395, People vs. Rogers, 348 Ill. 322. The testimony of the Appellee, the party most interested in the outcome of this suit, as to the physical condition of her husband at the time and just prior to the signing of the application, was not admissible and it is impossible to tell what effect it had upon the jury. The judgment in this case could not be upheld unless this court can say that the admission of the incompetent testimony was not prejudicial, and that cannot be said. Because of the error in the admission of the incompetent testimony, the judgment of the Circuit Court is reversed and the Cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FEBRUARY TERM, A. D. 1933.

TERM NO. 16.

AGENDA NO. 17.

THE PEOPLE OF THE STATE OF ILLINOIS
ON THE RELATION AND IN THE NAME OF
OSCAR NELSON, AUDITOR OF PUBLIC
ACCOUNTS OF THE STATE OF ILLINOIS.

vs.

MERCHANTS STATE BANK OF
CENTRALIA, ILLINOIS, et al

EARL D. AMSLER, RECEIVER OF MERCHANTS
STATE BANK OF CENTRALIA, ILLINOIS.
Appellee

vs.

AMERICAN SURETY COMPANY OF
NEW YORK
Appellant.

FULTON, J:

This is an action on an employees' fidelity bond issued to the Merchants State Bank of Centralia, Illinois, by the Appellant, American Surety Company of New York. The bond was in the penal sum of \$25,000.00, was dated March 22, 1923, and by annual renewals was kept in force until the Merchants State Bank was closed for liquidation on December 8, 1930. By the terms of the bond, Appellant for and in consideration of the annual premium agreed to indemnify the Merchants State Bank of Centralia, Illinois against direct loss sustained while the bond was in force and discovered as thereafter in the bond provided of any money or securities or both, to an amount not exceeding \$25,000.00. The material part of the bond insofar as the loss insured against is concerned, is defined in the following language:

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"A. Through any dishonest act, wherever committed, of any of the employes, as defined in section 6 hereof, whether acting alone or in collusion with others."

The record discloses that on December 8, 1930, the Merchants State Bank was insolvent and on that date closed by the Auditor of Public Accounts. On December 19, 1930 the Auditor of Public Accounts appointed A. D. Rodenberg as Receiver for the purpose of liquidating said bank. On January 2, 1931, the original bill was filed in this suit, setting up the circumstances surrounding the insolvency of the bank and praying for the confirmation of the appointment of a Receiver. On January 19, 1931, a decree was entered granting the relief prayed for including the appointment of A. D. Rodenberg as Receiver by the Court. This Receiver qualified but became deceased on February 4, 1931, and Earl D. Amsler, Appellee, was appointed as Receiver to succeed him. On April 1, 1932, the Appellee as such Receiver filed in this suit a petition against Appellant, American Surety Company for an order authorizing him to set off certain indebtedness alleged to be due the bank from Appellant, the American Surety Company of New York against a claim allowed in favor of the Surety Company. The main facts necessary to a consideration of the questions involved in this suit are as follows: There is no dispute as to the matters contained in the petition and admitted by the answer namely; the closing of the bank on December 8, 1930; the appointment of A. D. Rodenberg as Receiver; his death; the appointment of Amsler on February 14, 1931; the filing and allowance of the claim of the Appellant as a general claim in the sum of \$48,943.00; the execution and delivery of the fidelity bond by the Appellant to the Bank and that the bond was in full

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force and effect subject to its terms, until the closing of the bank in December 1930.

The record shows that on the date the bank was closed, it had in its employ one C. R. Bowman as Vice President and Charles H. Rebbe as Cashier, both of whom were employed by the bank in the operation thereof and were employees within the terms of said bond.

The petition alleged that while the bond was in force and effect and while Bowman was so employed, the bank did sustain certain direct losses, through the dishonest acts of the said Bowman. Eight distinct acts of Bowman are alleged to have been dishonest but only six are in controversy on this appeal.

The first act complained of was that on August 15, 1928, the Bank owned a note for \$600.00 signed by Walter C. Winkler and payable to the bank; that on or about August 18, 1928, the said Bowman canceled and surrendered said note to the said Winkler without same being paid, and then and there made a false entry upon the records of the bank showing the receipt of \$600.00 in payment of said note, which was not in fact received by the bank and also made certain false entries upon the records of the bank, purporting to show that on said date the bank had paid out for interest due from the bank the sum of \$600.00, no part of which was actually paid out by said bank on said date, and that said false entry of interest paid out was made for the purpose of balancing on the records of the bank the false entry of the receipt of said sum of \$600.00. That by means of said false entries the bank sustained a direct loss in the sum of \$600.00 by said false entries and dishonest acts of Bowman. The second, third, fourth and fifth alleged

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dishonest acts complained of were all similar to the one above outlined and all related to the cancellation of notes owned by the bank and signed by the Said Walter C. Winkler and the false entries upon the records of the bank showing the payment of interest for the purpose of balancing the false entries of the receipt of the sums due upon said notes. The notes ranged in amounts from \$475.00 to \$2550.00.

The sixth alleged dishonest act complained of was that on or about August 6, 1930, Bowman caused certain false entries to be entered upon the books and records of the bank, purporting to show that the bank had on that date received interest payments due to the bank aggregating the sum of \$2700.00 and for the purpose of covering up such false entries and balancing the same on the records of the bank, made certain other false entries on cash slips which were carried in the cash drawer of said bank as cash and afterwards charged off by certain false entries purporting to show that the bank had paid out interest on various dates aggregating the sum of \$2700.00 which was not in fact paid out by the bank, and by means of these false entries the bank sustained loss in the sum of \$2700.00 through the dishonest acts of Bowman.

No charge of dishonesty is made against the Cashier Rebbe except that under the direction of Bowman he assisted in making the false entries and that he suppressed knowledge thereof from the other officers and directors.

Bowman had been in active charge of the bank subject to the orders of the President and the Board of Directors.

The decree finds the facts practically as alleged in the petition to be true and particularly bases recovery for the Appellee upon the alleged dishonest acts of Bowman.

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The Appellant seeks to reverse the decree of the Court, urges among other grounds that the acts of Bowman were not dishonest within the meaning of the Fidelity Bond and that the Bank suffered no direct loss of monies or securities by reason of such conduct.

As to the Winkler transactions the facts show that Walter C. Winkler was during the period in question County Treasurer and ex-officio Collector of Taxes of Marion County, Illinois. Winkler was a regular borrower from the bank in the conduct of his private business. On August 15, 1928, he owed the Bank a note of \$600.00 which had been renewed from time to time. On that date Rebbe, the cashier, under the direction of Bowman, the Vice President, entered upon the records of the Bank a notation showing payment by Winkler of \$600.00 on his note, and on the other side of the ledger entered a notation showing the payment by the bank on that date of \$600.00 for interest. In other words, the note was charged off as paid and Rebbe under Bowman's directions charged the \$600.00 up to interest paid, canceled the note and delivered it to Winkler. The same procedure was followed with the other Winkler transactions complained of.

Bowman testified that Winkler was elected County Treasurer of Marion County in 1926. He lived in Centralia and Bowman had known him before he was elected to office. Winkler had been a customer of the bank both as a depositor and a frequent borrower before Bowman became connected with it. After Winkler became County Treasurer, Bowman had a conversation with him relative to the deposit in the bank of County monies in his hands as County Treasurer. Winkler told Bowman that a few banks in the County had made arrangements to receive

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some inactive funds he had on hand and that if Bowman's bank would pay interest on such deposits he would be willing to build up a large account at the bank. Bowman explained to Winkler that the bank was borrowing heavily from Chicago banks and that if it was satisfactory to the officers and board of directors he would be glad to make that kind of an arrangement. Bowman thought that by paying a smaller rate of interest to Winkler than was being paid to the banks in Chicago he could save some money for his bank. Bowman further testified that he discussed the matter with the cashier Rebbe and with the members of the finance committee of the board of directors. Rebbe denied knowing of the arrangement as did the members of the finance committee but all admitted that Bowman had authority to enter into agreements about matters of that kind unless instructed not to do so by the board of directors.

Bowman further testified that he then made an agreement with Winkler that the bank would pay interest on inactive deposits of over \$10,000.00, with the provision that these funds would not be withdrawn except on several days notice. In accordance with this agreement the deposits were made and an average daily balance during the tax collecting period of between \$75,000.00 to \$80,000.00 during 1927, \$80,000.00 to \$90,000.00 in 1928, approximately \$150,000.00 in 1929 and approximately \$200,000.00 in 1930 was maintained. Bowman also testified that the amounts complained of as items one to five in the Petition were payments of interest to Winkler in compliance with said agreement although they were made by cancellation of Winkler's indebtedness to the bank by the surrender of his notes with the exception of one payment in cash and the notation on the other side of the ledger showing the various amounts paid out for interest.

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As to the sixth item complained of the testimony shows that on June 30, 1930 a cash item was placed in the drawer for \$2700.00 under the direction of Bowman in order to show that much more assets in the bank. It had been the custom of the bank in order to keep the profit account up, to charge interest earned but not yet collected at various times and put a cash slip in the drawer, and then as the interest was collected to charge it off and that was what was done in this case. No money passed in or out of the bank on account of any of these credits or debits. The cashier Rebbo testified that he did not think there was plenty of earned but uncollected interest to cover the \$2700.00 transaction because there was another slip in the drawer. He further testified that this was done because Bowman saw there was not enough interest or profits as shown by the books to pay the usual dividend to stockholders on July 1st, the usual dividend paying date. Bowman testified that the \$2700.00 represented a portion of earned interest and after the earned interest was collected it was credited to this account and that such a custom had obtained in the bank at semi-annual periods for years prior thereto; that this matter had nothing whatever to do with the declaration of a dividend on July 1, 1930, because there was sufficient undivided profits to take care of that; that it was a bookkeeping transaction and did not represent any money in or out of the bank. The capital stock of the bank was \$100,000.00 and the dividend declared on July 1, 1930 was a five per cent dividend amounting to \$5000.00. With the item of \$2700.00 for interest earned but not collected the statement of the bank showed the net earnings to be \$5,825.79 for the six months preceding July 1st. The undivided profits of the bank on June 30, 1930 were \$30,654.69.

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O. A. James, the State Bank Examiner, who during the period examined the Bank, testified there was nothing unusual about charging up interest earned but not collected during the time he examined the Bank, and that the method used was not unusual or different from a number of other banks; that this fact was known to the bank examiners and the State Banking Department of Illinois, and also that the custom of paying interest to public officials for public funds left on deposit was known to him as bank examiner; that there was nothing unusual about it and that he knew of the Bank doing that at the time he was examining it.

Appellant insists that the acts of Bowman as disclosed by the evidence do not constitute dishonest acts on his part, and in any event they did not result in any direct loss to the bank of money or securities in which the Bank had a pecuniary interest. The Appellee relies on the reasonable inferences to be reached from all the facts and circumstances shown by the record. After a careful reading of the testimony we cannot say that such an inference is warranted. To do so the Court would have to conclude that the entire story of Bowman relative to the interest payments was a pure fabrication manufactured for the defense of this case. There are circumstances surrounding these transactions that might appear suspicious and we would greatly dislike to think that it was a common practice for banks to carry anticipated interest as assets but a transaction where a public official receives interest on a deposit is legal and the question then becomes one between the officer and the County as to who shall retain the money. *People v. Small*, 319 Ill. 437. If therefore Bowman had the right to make the agreement with Winkler to pay interest

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on the County deposits, and if the payments of interest were made, even in a manner that cannot be designated as good banking, the acts of Bowman did not constitute dishonest acts, and the bank suffered no direct loss by reason of such acts. In the case of First National Bank v. National Surety Company 46 A. L. R. 967 the Court of Appeals of New York held that the acts of the bank cashier in permitting large overdrafts by a customer through a mistake in judgment, or in a course of business established by custom in the bank was not a dishonest act within the terms of a fidelity insurance policy insuring against loss through fraud and dishonesty.

The burden was on the Receiver in this case to show the bad faith and dishonest intent on the part of Bowman which we believe he has not succeeded in doing by any competent evidence.

On the \$2700.00 item involving the placing of the cash slip in the drawer on June 30, 1930 to show as assets of the bank for interest earned but not collected as of that date, we do not believe such act could be held to be dishonest within the meaning of the policy. The manner of handling this item was known to the bank examiner and he testified that while it was not good banking it was a custom which the Auditors office did not disapprove. The bank did not close until nearly six months after this transaction and it would be purely speculative to say that the dividend paid to the stockholders on July 1st, 1930 would not have been paid but for this particular transaction.

It is the judgment of this Court that the acts complained of did not constitute dishonest acts within the meaning of the fidelity policy and that the bank suffered no direct loss

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by reason thereof and therefore the decree of the Circuit Court of Marion County will be reversed with directions to dismiss the petition for want of equity.

REVERSED WITH DIRECTIONS.

Not to be reported in full.

FILED

SEP 18 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, A. D. 1933.

TERM NO. 4.

AGENDA NO. 10.

271 I.A. 615

Charles Corcoran,
Defendant in Error,

vs.

Taylor Collieries Company, a
Corporation, and Taylor Coal
Company, a Corporation,
Plaintiffs in Error.

Error to

Circuit Court of
Williamson County.

EDWARDS, F. J.

On August 22, 1903, Thomas Stotlar, being the owner of a tract of land in Williamson County, conveyed the same by deed to W. H. Ford, which instrument contained the following reservation: "Except the coal under said land and the right to mine same without being amenable for any damages accruing therefrom." The land was subsequently transferred a number of times, each deed containing, in substance, the above mentioned exception. On December 8, 1910, a portion of the premises were sold to Charles Corcoran, defendant in error, and Margaret Corcoran, his wife; the deed of conveyance embodied the following qualification: "Reserving the coal under said lot and the right to mine same, and is not held responsible for any damages that may occur while removing said coal, or after same has been removed."

Afterwards, on May 27, 1904, Stotlar executed a mineral lease to W. A. Ferrine of the coal rights under such premises. This was subsequently assigned and re-assigned to several lessees, until it ultimately came to the plaintiff in error, Taylor Collieries Company, who later transferred their interest therein

to the Franklin County Coal Company.

Defendant in error improved the lot by the erection of a dwelling house and other buildings, which he was occupying on April 28, 1925, when, owing to the removal of the underlying coal, the surface subsided several feet, damaging the buildings and other improvements on the lot. Defendant in error sued plaintiffs in error, together with the Franklin County Coal Company, to recover damages for the injury.

The pleadings upon which the issues were finally tried, consisted of the declaration which, with amendments, embraced eight counts, the first charging plaintiffs in error, in removing the coal, failed to leave sufficient support for the ground, in consequence of which it subsided; the second, that the subsidence affected the streets and alleys, and interfered with egress and ingress; number three, that the mining was negligently done; the fourth was substantially the same as the second, and charged damages to ingress and egress, as well as to the house.

The amended first additional count set forth that coal was removed from beneath the lot, and premises adjacent thereto, without artificial supports being provided. The third additional count alleged negligent mining, and that plaintiffs in error had no interest in the premises, and no right to damage same. Additional count number two charged the removal of coal from adjacent premises, a duty to support the surface thereof, and a deprivation of lateral support, whereby the defendant in error's lot was damaged. The fourth and last additional count charged that the mining and removal of the coal was willfully and wantonly done.

To which was pleaded the general issue, and a special plea of the Franklin County Coal Company to the effect that it did

not mine the coal. The cause was tried before the Court without a jury. At its conclusion the Court found the Franklin County Coal Company not guilty, and found plaintiffs in error guilty, assessing damages against them in the sum of \$2,000.00; to review which judgment, this writ of error was sued out.

Plaintiffs in error principally contend that the deed running to defendant in error, which contained a reservation of the coal rights under the lot in question, the right to mine same, and absolution from damages on account thereof, bars his right of recovery.

It appears to be the established rule, that where an instrument of conveyance contains a release from all liability for damages for injuries to the surface, resultant from mining operations beneath the ground, transferred by the deed, the covenant runs with the land and is binding upon subsequent grantees of the surface. *Corcoran v. Franklin County Coal Co.*, 249 Ill. App., at page 553. 40 C. J., 1198, Sec. 925. Not only was such reservation in the original deed, but was likewise contained in the instruments of the mesne conveyances, down to and including that to defendant in error; so under the rule, the covenant must be held as chargeable upon his ownership of the premises.

Defendant in error accepted the deed with knowledge of its contents, one of which was the reservation before referred to, and in the absence of fraud or misrepresentation, of which there is no claim here, is bound by its covenants.

The effect of a saving clause, such as the one under consideration, has been passed upon in various jurisdictions. In *Corcoran v. Franklin County Coal Co.*, supra, at page 554, this court stated the rule to be that where a grantee stipulates for

the removal of coal beneath the land he is acquiring, and releases all damages resultant to the surface from such removal, he cannot, in the event of a consequent subsidence of the surface, require the owner of the mineral estate to respond in damages. The same holdings appear in *Paull v. Island Coal Co.*, 88 N. E. R., 959 (Ind.). *Charnetski v. Miner's Mills Coal Mining Co.*, 113 Atl. Rep., 683 (Pa.). *Atherton v. Clearview Coal Co.*, 110 Atl. Rep., 298 (Pa.). The language employed in the reservation, in the instant case, is not of doubtful import; on the contrary, is plain and understandable, and clearly evidences the intention of the parties. In our opinion, its terms are sufficiently comprehensive to absolve the lessor Stotlar, or those who trace their rights to him, from responding in damages to the owner of the surface, for any injuries occasioned thereto by the removal of coal beneath the premises.

The fourth additional count of the declaration charges plaintiffs in error with willfully doing acts so as to cause a subsidence of the surface above the mine. We find nothing in the evidence to sustain such allegations, and in our opinion such averments are wholly unproven.

Upon a consideration of the entire record, it is apparent that plaintiffs in error, in their mining operations, were within their rights; that defendant in error expressly released any claims for damages he might have had against them on account of such work, and that he has failed to prove a cause of action.

The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment finding plaintiffs in error not guilty.

Reversed and remanded with directions.

Not to be reported in full.

FILED

SEP 18 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, A. D. 1933.

TERM NO. 10.

AGENDA NO. 3.

271 I.A. 615

Margarot Clare (Williams),
Appellee,
vs.
The Bond County Gas Co.,
A Corporation,
Appellant.

Appeal from
Circuit Court of
Bond County.

MURPHY, J.

This case was before this court at a previous term. The judgment then appealed from was reversed and the cause remanded. Clare v. Bond County Gas Co., 267 Ill. App. 437.

After the case was remanded, appellee filed two additional counts and withdrew all the counts of the original declaration. Issue was joined on the two additional counts and a trial resulted in a verdict for appellee for \$850. Judgement was entered on the verdict and appellant prosecutes its appeal from that judgment.

The grounds upon which appellant seeks a reversal are that the evidence does not show by a preponderance that appellant had knowledge that the gas was leaking into the building and that it is not shown that appellant was in any way negligent, that appellee was guilty of contributory negligence, lack of evidence to support the damages assessed and error in giving instructions on behalf of appellee.

The gist of the negligence charged in the first additional count is that appellant failed to shut off the gas from said building, having had notice that gas was escaping into the building occupied by appellee. The second additional count avers that prior

to December 1, 1931, appellant was notified that the gas pipes in the building were leaking and were not in safe condition to transport gas into the building and that appellant negligently continued to permit gas to pass into the pipes in said building. The pleadings of appellant consist of the general issue and eight special pleas.

In addition to the facts recited in the former opinion the evidence shows that appellant on October 31, 1931, turned the gas into said building at a valve owned and controlled by it. This valve was located about seven feet outside the property line of the building, the sidewalk being between the building and the valve. The supply pipe for the building extended from the valve, under the sidewalk, through the south brick wall and under the first floor, a distance of seven or eight feet, then turned up through the floor into a closet on the west side of the main front room of the building. The meter was located on the north wall of the closet. There was another closet adjoining this on the north. A gas pipe attached to the meter ran overhead to a stove located in another room. Immediately after the gas was turned on at the meter by appellant an odor of gas was noticeable in appellee's rooms. She testifies that she told Mr. Rowland, president of appellant, that the gas was very bad in the rooms and that she did not know what to do with it, that he told her to call Mr. Secrest, the one who had installed the stove for appellee, that Rowland and Secrest were at her building at the same time, that Rowland told her to put up the windows and everything would be all right but not to strike a match. She says Rowland told her the stove needed a pipe to convey the fumes up the flue. The pipe was installed and the gas odor continued; that Rowland, on another occasion made suggestions as to

what she should do in reference to the stove pipe and the chimney in order to check the odor of gas. This extended over a period of three or four weeks. On at least two other occasions, he was in the building. About four weeks after the gas was turned on and after the several conversations between appellee and Rowland and his suggestions as to what to do, Rowland and Secrest were at appellee's shop and Secrest tested the meter. He testifies that the meter tested correctly and that he reported the results of the test to Rowland and told Rowland there was a leak somewhere because of the odor of gas and that it must be outside of the building. Appellee is corroborated by other witnesses and in the main, her evidence on these matters is not denied by Rowland.

On December 1 following, appellee's agent or employee while in search of a tool to remove a door, entered a closet where the meter was located and it being dark, struck a match and then passed from this closet to an adjoining closet, the match still burning. He testifies that when about a half-step in the latter closet, he heard a hissing noise and blue flames "fed up" to the match and an explosion followed. The front end of the building was blown onto the sidewalk, the floor upheaved, that part of the floor over the supply pipe being higher than other parts of the floor.

There is evidence to the effect that the odor of gas was more noticeable in that part of the building over the supply pipe extending to the meter than other parts, that it was so bad in the closets that it was necessary to keep the closet doors shut, that it was a different odor than the odor in the room where the stove was located, it being described as a pungent or musty odor.

There is evidence in this record if believed by the jury to warrant the finding that appellant had notice and knowledge or

was chargeable with knowledge that the pipes were leaking gas and that it was escaping into the building.

A gas company furnishing gas is not under the law required to examine or inspect the pipes of the owner of the building to whom it furnishes gas and, generally speaking, would not be liable to such owner for an injury done to him or his property caused by escaping gas, yet where it appears that the gas company had such notice or knowledge of the escaping gas as would suggest to a person of ordinary care and prudence that injury would result to a person using such building, it then becomes the duty of the gas company to stop the flow of gas into the building until such pipes are repaired and made safe for transporting gas. *Clare v. Bond County Gas Company*, Supra; *Southern Indiana Gas Co. v. Tyner*, 49 Ind. App. 475, 97 N. E. 580; *Windish v. People's Natural Gas Co.*, 248 Pa. 236, 93 Atl. 1003; *Schmeer v. Gas Light Co. of Syracuse*, 147 N. Y. 529, 42 N. E. 202; 12 Ruling Case Law, page 909, section 49.

The proof shows that Williams, who struck the match leading to the explosion and who was working for appellee at the time of the explosion, had been in the building several times prior to December 1. He testifies that he noticed the odors and on one occasion went with appellee to the office of appellant to make complaint about the odors of gas. It is urged that this amounts to contributory negligence and bars appellee's right of recovery.

In general, the question of contributory negligence is one of fact and should be submitted to the jury. *Pienta v. Chicago City Railroad Co.*, 284 Ill. 246.

The fact that Williams knew of the existance of gas odors in the rooms and struck a match in the part of the building where the odors were the most noticeable can not be said under the facts

of this case, as a matter of law, negligence per se. *Dowler v. Citizen's Gas and Oil Company*, 71 W. Va. 417; 76 S. E. 845; *Louisville Gas Co., v. Gutenkuntz*, 82 Ky. 433; but it is a circumstance to be considered by the jury with all the other circumstances, in determining whether appellee was guilty of contributory negligence. All that the law requires of one acting under circumstances as here is that he shall exercise ordinary care for his own safety and the safety of his property. Under the evidence, the verdict of the jury means that appellee and her agent were in the exercise of due care at the time of and immediately prior to the explosion and we see no reason to disturb that conclusion.

Appellant assigns as error the giving of appellee's instruction number one, which was in substance the same as instruction number six referred to in the former opinion of this court. This instruction told the jury that if they found that the appellant knew or by exercise of reasonable care could have known that said pipes were unfit for the transportation of gas that then it was the duty of appellant to cause the service pipes to be repaired by the person whose duty it was to do so or to have the gas shut off at the street and failure in that behalf constituted negligence. This court reversed the former judgment on the grounds that the acts of negligence proven did not support the averments of the declaration. Instruction number six was commented upon in that connection. Under the negligence charged in the additional counts, the evidence in the case and upon the authorities cited, instruction number one was applicable and no error was committed in giving it.

Appellant questions the sufficiency of the evidence to support the verdict on the value of the property destroyed. Appellee

testifies that she had been conducting this shop about three months; that when she went into business, she priced fixtures and bought these and is familiar with the fair cash market value of the same and gave her opinion as to that value. She testifies the same in reference to the stock of goods destroyed, adding that for three months she had bought and sold this kind of merchandise. Appellant offered no evidence upon the question of value. The finding of the jury is within the range of the testimony and should not be disturbed.

In our opinion there is no reversible error in the record and the judgment of the trial court is affirmed.

Affirmed.

Not to be reported in full.

FILED

SEP 18 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT,
MAY TERM, A. D. 1933.

TERM NO. 12.

AGENDA NO. 15.

271 I.A. 615³

George Theodorakos, James
Lambert and Nick Vlahakos,
Co-partners,
Appellants,

vs.

Gus Mehilos and Frank Rigas,
Appellees.

Gus Mehilos and Frank Rigas,
Appellees,

vs.

George Theodorakos, James
Lambert and Nick Vlahakos,
Co-partners,
Appellants.

Appeal from,

Circuit Court of,

Madison County.

Bill to Cancel
Lease and Other
Relief.

Cross Bill for

Rent.

MURPHY, J.

Appellants filed their bill in the Circuit Court of Madison County, seeking cancellation of a certain lease.

The facts as disclosed by the evidence and pleadings are that appellants have for several years been engaged in operating a restaurant and lunch room in the City of Alton. Appellees owned or had control of a building known as the Wead building, which was located near to and in the same block as appellants' restaurant. In July, 1929, appellees leased one of their rooms to A. B. Cox & Sons for a period of five years, beginning October first following, to be used as a news stand and other commercial enterprise. October 10, 1929, appellees leased to appellants another of their rooms for a period of seven years, beginning October fifteenth at a rental of \$150. per month, payable monthly in advance. There was no restriction as to use except it should not be used in violation of law or ordinance. Appellants never occupied the room but sub-

let, which they had a right to do under the lease, to William B. Schmoeller for \$125. per month. The lease contained the following clause, "And the said parties of the first part agree that they will not lease any part of said building to be used as a restaurant or lunch room."

In April, 1931, Cox and Sons began selling sandwiches and October following included in their business the sale of light lunches. Appellants made protest to appellees of the violation of this clause in their lease. Other conversations followed soon after in reference to the matter but Cox and Sons continued to sell sandwiches and lunches. Appellants continued to pay the rental of \$150. per month until November, 1931. For November appellants paid \$112.50 and for the months of December, January and February following, they paid \$125. per month. No other payments were ever made.

In October, 1932, appellants filed their bill alleging the making of the lease, the violation in permitting Cox and Sons to operate a lunch room, claimed their restaurant business had been greatly damaged, that appellees had threatened suit for rents and asked for cancellation of the lease and allowance of damages. Appellees' answer admitted the lease, but denied they had broken any of its terms. They also filed a cross bill, making appellants cross defendants, alleged the lease to be in full force, that appellants were in arrears on their rent and asked for an accounting of the same. Appellants answer denied the lease was in force and denied that rentals were due.

The case was heard before the court and a decree was entered finding that the clause in appellants' lease wherein the appellees agreed not to lease any part of said building for restaurant or lunch room purposes was a vital part of the consideration for leas-

ing of said rooms, that appellees had violated the terms of said lease but that appellants were at the time of filing their bill in default of rental payments and that the only relief they were entitled to was a cancellation of the lease upon paying a reasonable rental for the period that Cox's served lunches. A decree was entered cancelling the lease as of date of January 14, 1933, the date the court announced his findings, and found a reasonable rental to be \$1312.50, or \$125. per month, and entered a money decree against appellants for that amount. Appellants perfected their appeal and assign as errors (1) that the court erred in not cancelling the lease as of March 1, 1932, (2) that the court erred in reopening the case on motion of appellees for the introduction of evidence of damages after the court had announced his findings, and (3) error in entering money judgment against appellants. Appellees assign cross errors claiming that they were entitled to rental as fixed by the lease of \$150. per month and that there was error in reducing it \$25. per month, or a total deduction of \$375.

There was no provision in the lease that the violation of the foregoing clause would operate as a discharge of the lessees. In the absence of such a provision it becomes a question for the court to determine whether or not the default is in a matter which is vital to the contract, for if it is not, the contract will not be discharged. *City of Belleville vs. Citizens Horse Railway Co.* 152 Ill. 171; *People vs. Central Union Telephone Co.* 232 Ill. 260; *University Club vs. Deakin*, 265 Ill. 257. The evidence warrants the finding that the clause wherein lessors covenanted against renting other rooms in the building for restaurant or lunch room purposes was vital to the lease and formed a material part of the consideration for appellants entering into it. *University Club vs. Deakin*, supra.

Appellees contend that the clause was directed at future acts of leasing, and having made the Cox lease prior to appellants lease there was no violation of it. The view we take of this case makes it unnecessary to pass on that question, but assuming that there was a violation of it then appellees were thereby depriving appellants of the enjoyment of the premises leased, in accordance with the benefits and rights set forth in the contract. It amounted to an eviction. In *Auto Sup. Co. vs. Scene-in-Action Corp.* 340 Ill. 196 the court said "The eviction which will discharge the liability of the tenant to pay rent is not necessarily an actual physical expulsion from the premises or some part of them, but any act of the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the premises constitutes a constructive eviction of the tenant, which exonerates him from the terms and conditions of the lease, and he may abandon it. There can be no constructive eviction, however, without the vacating of the premises. Where a tenant fails to surrender possession after the landlord's commission of acts justifying the abandonment of the premises the liability for rent will continue so long as possession of the premises is continued." *Chicago Legal News Co. vs. Browne*, 103 Ill. 317; *Keating vs. Springer*, 146 Ill. 481; *Barrett vs. Boddie*, 158 Ill. 479.

Under the rule as announced in the foregoing authorities there was no error in the courts refusal to cancel the lease as of March 1st, 1932, unless appellants abandoned the premises at that time. The evidence does not disclose any action taken by appellants towards vacating the premises. There were several conversations between the parties where cancellation of the lease and payment of damages were discussed, but no agreement reached on either subject. Schmoeller continued to occupy the premises, and it does

not appear that appellants lease with Schmoeller was assigned to appellees or that he attorned to them. Appellants in their bill filed October 10, 1932 allege that the lease is then in force; that they had sublet it to Schmoeller and he occupies the premises; that while they are obligated to pay \$150. per month Schmoeller pays to them only \$125. Under this state of facts there was no such abandonment of the premises as would operate to discharge appellants from payment of rents.

The only cross error assigned by appellee is to the part of the decree allowing appellants a reduction of \$25. per month from the contract amount of \$150. for a period of fifteen months. The court found that there had been a violation of the terms of the lease and that appellants were liable only for a reasonable rental during the fifteen month period that Cox's were selling lunches. No evidence was offered upon what was a reasonable rental, and furthermore under the facts, as found, and under the authorities cited appellants were liable for the rental of \$150. per month to January 14, 1933, or a total of \$1687.50.

The introduction of evidence before the court was started October 22, 1932. Both parties introduced evidence on that date and rested their case. Later, the same day, the court on motion of appellants re-opened the case for further evidence. During the hearing on this date the chancellor announced that either party could, at a later date, introduce evidence on the question of damages if it became an issue. Other hearings were held subsequent to that date and prior to January 14th. On that date the chancellor announced his findings and made an entry on the court docket briefly reciting findings of fact and concluded it "as per decree to be approved by the court." The decree, as approved, was entered February 20th. After January 14th and

prior to the entering of the final decree the court, on motion of appellee, re-opened the case and heard evidence on the amount of unpaid rent. Appellants objected on the grounds the case was closed January 14th, and that they had no notice of the hearing. The objections were over-ruled. During the arguments leading to the ruling of the court, solicitor for appellee suggested that if appellants had any rebuttal evidence that the case be sent for a day certain. Then the following colloquy took place:

Court: I suggest, Judge Trarcs, that you and Mr. Jacoby indicate some date you want this continued to for you to answer this testimony.

Judge Trarcs: I would like to have a ruling on my objection first.

Court: Objection to the testimony will be over-ruled.
(Exception by complainants)

Judge Trarcs: The cross defendants are not asking that this case be re-set, having objected to the ruling of the Court, we are standing by our objections.

Court: Objections over-ruled.

In Brelsford vs. Community High School District 328 Ill. 27, the court said, "The order of the introduction of evidence rests in the sound discretion of the court, and the exercise of such discretion by allowing the case to be opened for hearing further evidence after both parties had rested and the cause had been taken under advisement by the court will not be interfered with except for clear abuse."

A decree in equity is not final until approved by the chancellor and filed for record. His mere oral announcement of the decision and the grounds upon which it is based is not controlling. The whole matter is completely under his control and is subject to be altered, changed or even disregarded, until the written decree is approved and filed for record. Brelsford vs. Community High School District, supra; Moore vs. Shook, 276 Ill. 47; Cameron vs. Clinton, 259 Ill. 599. There was no abuse of discretion in re-opening the case for the introduction of evidence.

The decree of the Circuit Court of Madison County is affirmed, except as to the amount of the money judgment in favor of appellees and against appellants; said judgment should be for \$1687.50, and the cause is remanded with directions to the court to enter money decree for said amount.

Reversed and Remanded with Directions.

Not to be reported in full.

FILED

SEP 18 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, A. D. 1933.

TERM NO. 17.

AGENDA NO. 19.

Thomas O'Connell,
Defendant in Error,

vs.

Charles L. Chelf,
Plaintiff in Error.

Error, to,

city
~~Circuit~~ Court of,

East St. Louis.

271 I.A. 615⁴

MURPHY, J.

Plaintiff in error, herein referred to as defendant brings this suit to reverse a judgment obtained against him by defendant in error, herein referred to as plaintiff, in the city court of East St. Louis, for injuries alleged to have been sustained by plaintiff when he was struck by defendant's automobile.

The amended declaration consisted of two counts, the first charging general negligence on the part of defendant in the operation of his automobile and the second count wilful and wanton negligence. The defendant filed the general issue plea. The jury returned a verdict in favor of plaintiff for \$5000. and after overruling a motion for a new trial judgment was entered on the verdict.

Defendant made a motion to direct a verdict at the close of plaintiff's evidence and at the close of all the evidence. The court directed a verdict of not guilty as to the second count and overruled it as to the first count.

The defendant urges as grounds for reversal the insufficiency of the evidence to prove due care on the part of the plaintiff, no evidence of negligence of the defendant, error in the instructions and that the verdict is excessive. Defendant assigns cross error on the ruling of the court in directing a verdict of not

guilty on the second count.

The accident was alleged to have occurred at the southeast corner of the intersection of Sixth Street and Illinois Avenue in East St. Louis, Illinois Avenue extends east and west, is paved and has two street car tracks in the center of the street. Sixth street crosses the avenue at right angles, and is paved. At the time of the accident there was a stop sign on Sixth Street just south of the intersection to stop the northbound traffic on Sixth Street before entering Illinois Avenue.

About Seven o'clock on the evening of October 29, 1931, plaintiff was walking east on the sidewalk on the south side of Illinois Avenue. Defendant was driving his automobile north on Sixth Street and when plaintiff was near the east curb line of Sixth street he was struck by defendant's car knocking him down, breaking his right leg and causing injuries to his head and body.

Plaintiff testifies that before he stepped from the sidewalk on to Sixth Street he looked both ways and did not see any automobile that he started to walk across the street to the sidewalk on the other side, that when he was in the center of the street he looked again to the right and did not see any automobile or lights and did not hear any warning, that when he was about three foot from the east curb he was struck by the automobile. He testified that it was light and he could see a distance of a block.

Herbert Monahan who, at the time of the accident, was in front of his place of business on Illinois Avenue and one hundred and fifty feet east of Sixth Street testifies that he saw the plaintiff crossing the street before the accident and there was nothing in his walk or manner of crossing the street that attracted his attention, that he did not see defendant's automobile until it struck plaintiff, that he did not hear any warning

or sound from the automobile.

In addition plaintiff introduces the evidence of Dr. Campbell and certain police officers as to conversations had with defendant soon after the accident, the substance of which was that the defendant had said the accident occurred at the Sixth Street intersection, that he did not see plaintiff until after he hit him and that he didn't know there was a stop sign on Sixth Street.

There is a conflict in the evidence upon some points particularly as to where the accident occurred. Defendant and his witnesses testified that it occurred at the intersection of Fifth Street and Illinois Avenue, but it is apparent that all testified to the same accident. There was sufficient facts before the jury that they could judge of the creditability of the witnesses and the weight to be given to their testimony.

Defendant and three persons who were in the automobile with him at the time of the accident testified that they did not see plaintiff before he was struck. All of them testify that defendant stopped his automobile at the stop sign and when the car started and had moved a few feet they felt the shock of the car; that defendant brought his automobile to a stop near the street car tracks in Illinois Avenue and that they found plaintiff lying on the pavement.

The burden of Proof of due care rests on the plaintiff and if there is any evidence tending to prove due care on the part of the plaintiff it then is a question of fact for the jury.

The only question for a court to determine is whether there is evidence that tends to prove such care. A court can only determine adversely to the plaintiff when no other conclusion can be reasonably drawn from the evidence that is favorable to the plaintiff. *Pionta v. Chicago City Ry. Co.* 284 Ill. 246.

On the facts as they appear in this record the question whether plaintiff was guilty of contributory negligence was properly submitted to the jury. *Gannon v. Kiel*, 252 Ill. App. 550.

The contention of the defendant that there is "no evidence whatever of any negligence on the part of the defendant" cannot be sustained. He testifies he did not see plaintiff until after the car hit him, that he stopped at the stop sign and moved only a few feet at a slow speed before he struck the plaintiff. He is corroborated in this by three witnesses who were in the automobile with him. Even though he came to a full stop at the stop sign he had not fully discharged his duty as to pedestrians that might be crossing in front of him. It was his duty to be on the lookout for pedestrians and to have his car under control and if he saw plaintiff crossing the street to give reasonable warning of his approach and to use every reasonable precaution to avoid injuring him and if necessary stop his car until he could safely proceed. *Gannon v. Kiel. supra.*

Under the facts in this record we are of the opinion the court properly submitted the case to the jury and that their finding should not be disturbed.

Instruction number 4 given at the request of plaintiff told the jury of the various elements that they should take into consideration in assessing damages in the event they found for the plaintiff. Defendant contends there was no evidence to support that part of the instruction which referred to "his inability to work in his usual line of employment in the past and in the future and the probable duration of such disability, if shown by the evidence" as an element of damage. Plaintiff testified that he had been employed as a guard at the freight house of the Pennsylvania railroad for thirty years, and that he received one

hundred dollars a month for such services. The physician, Dr. Campbell who had treated him for the injuries sustained testified as to the probable duration of his incapacity to work and gave his opinion as to the permanency of the injuries. None of the evidence was contradicted and it formed a basis for the giving of the instruction. There was no error in the giving of the instruction number 4.

Defendant's contention that the verdict is excessive cannot be sustained. The total pecuniary loss on account of hospital care, medical attention and loss of time exceeded \$1400.00. There is evidence tending to prove that there will be further medical expense and loss of time. The plaintiff received a cut over the right temple extending to the bone, which will leave a scar, suffered a slight concussion from which he has headaches and dizziness. He suffered considerable pain for a period of several months. The fibula of the right leg was fractured and as a result he had not been able to return to his usual work. The medical testimony was that there would not be a complete recovery, and there would always be restriction in the movements of the knee. There is nothing in the record to warrant the conclusion that the verdict was the result of bias or prejudice of the jury, or that it was so excessive as to demand a retrial.

The conclusions we have announced on errors assigned by defendant make it unnecessary for us to consider the cross error assigned on the action of the court in directing a verdict of not guilty on the wilful negligence count.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

FILED

SEP 18 1933

Walter M. Buckham
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MAY TERM, A. D. 1933.

TERM NO. 19.

AGENDA NO. 6.

W. F. Wayne, Administrator of the)
Estate of Orrin W. Black, Deceased,)
Appellee,)

vs.)

S. L. Wilcoxson,)
Appellant,)

and)

Paul Dupce,)

Defendant.)

271 I.A. 616¹

Appeal from,

Circuit Court of,

Madison County.

MURPHY, J.

This suit was brought by W. F. Wayne, administrator of the estate of Orrin W. Black, deceased, appellee, against S. L. Wilcoxson, appellant and Paul Dupce to recover damages for the death of Plaintiff's intestate, which was the result of injuries sustained when the automobiles driven by appellant and Dupce, respectively, collided at the intersection of Hillsboro Avenue and Buchanan Street in the City of Edwardsville. The accident happened about ten o'clock on the evening of June 2, 1932.

Hillsboro Avenue extends east and west and Buchanan Street north and south. Both are paved streets and are in a residence district. Hillsboro Avenue is about thirty-five feet wide at the intersection and Buchanan Street is about thirty feet. At one time State Route No. Four from Springfield to St. Louis was routed over Hillsboro Avenue but the evidence is not clear as to whether it was so used at the time of the accident. There was a stop sign on Buchanan Street, south of Hillsboro Avenue to

stop traffic before entering Hillsboro Avenue. Appellant was driving west on Hillsboro Avenue, Dupce was driving north on Buchanan Street. There was a telephone pole standing on the boulevard just back of the curb and not far from the sidewalk on the north side of Hillsboro Avenue and ten or twelve feet west of the west curb line of Buchanan Street. The street light at the intersection was burning. The deceased, a boy seventeen years of age, and a girl companion were on the sidewalk, at or near the northwest corner of the intersection. When the rear of appellant's automobile was on or near the center of Buchanan Street, as extended across the intersection, the Dupce car collided with the left rear of appellant's car.

As a result of the collision, appellant's automobile swung to the north and the right rear of the car crashed into the telephone pole, breaking it, and coming to a stop with the rear end on the back of the curb, headed in a southwesterly direction. The distance from where the appellant's car was struck to where it stopped was twenty-five or thirty feet. It does not appear that any part of appellant's car was off the paved part of Hillsboro Avenue except the rear. The evidence does not show what part of the car struck the deceased. He was killed instantly and after the car came to a stop, his body was found lying back of the curb and eight or ten feet west of the pole. The girl's body was found thirty to thirty-five feet farther west. No part of appellant's car was damaged except the rear half. The Dupce automobile came to a stop fifteen or twenty feet north of Hillsboro Avenue.

There were several eye witnesses to the accident. Matilda Seaburger, testifying for appellee, says she was sitting at the window in her residence at the northeast corner of the intersection and her attention was attracted to it by the crash. On

direct examination, she stated that she saw both automobiles and both were going fast. On cross examination, when being interrogated in reference to the speed of appellant's automobile, she stated that there was nothing about the speed of his car that attracted her attention until they crashed at the intersection. She did not give any opinion as to the miles per hour either car was traveling.

Robert Funke, testifying for appellee, stated that he was going east on Hillsboro Avenue and was at the time of the collision, about twenty or twenty-five feet east of Buchanan Street. He saw appellant's automobile when he was at the center of Buchanan Street and appellant was then about one hundred and fifty feet away. The car had lights burning. There wasn't anything about the movement or action of the car that attracted his attention to it until after the crash. When he was about the center of Buchanan Street, he saw the Dupee automobile coming from the south about three hundred and fifty feet away. He gave as his opinion that the Dupee automobile was, at the time it reached Hillsboro Avenue, traveling thirty-five to forty-five miles per hour. He did not observe the Wilcoxson car sufficiently to estimate its speed. The Dupee automobile did not stop or slow down before entering Hillsboro Avenue and was at the time it crashed into the Wilcoxson automobile, traveling thirty-five to forty-five miles per hour.

John Haliburton, the only one of the occupants of the Dupee automobile to testify, stated that he saw a "flash" of the Wilcoxson car when it was about fifteen or twenty feet away; that it was coming "awful fast". When he saw the Wilcoxson car, it was about fifteen or twenty feet away and he saw the flash of it, he didn't know whether it was to the right or left, he thought

it was in front of them. On cross examination, he admitted testifying at the coroner's inquest to the effect that he didn't see what happened, that he was engaged in conversation with the other occupants of the car.

The eye witnesses to the accident testifying on behalf of the appellant, consist of Raymond Hoffman and his wife and his wife's mother, Mrs. Schneider. They were driving east on Hillsboro Avenue in their automobile, Mr. and Mrs. Hoffman in the front seat and Mrs. Schneider in the rear seat and were within a block of Buchanan Street when their attention was first attracted to the noise of the Dupee car. Mr. Hoffman testified that when he was approaching Buchanan Street, he slowed down to as slow as a walk in order to let the Dupee car pass in front. When he first noticed the Wilcoxson automobile, it was not quite in the center of the intersection and was traveling about twenty miles per hour. The Dupee automobile did not change its speed before entering the intersection and was at the time of the collision, going not less than forty miles per hour. Both cars had head lights burning. The Wilcoxson automobile reached the intersection first and it was in the center of the intersection when the Dupee car was about fifteen feet away. When the cars collided, the rear of the Wilcoxson automobile was in the center of the intersection and on the north side of Hillsboro Avenue.

Mrs. Huffman testified she noticed the Dupee car when it was about three hundred feet from Hillsboro Avenue; that it was traveling thirty-five to forty miles per hour and that she first observed appellant's car about fifty feet east of the intersection and that his car was in the middle of the intersection when the Dupee car crossed in front of them and hit the back of the appellant's automobile; that the Wilcoxson car entered the

intersection first and when the front of his car went into the intersection, the Dupree car was about eight feet from Hillsboro Avenue. At the time of the collision, the Dupree car was traveling between thirty-five and forty miles per hour. The Dupree car hit the appellant's car and it swung around, the rear end striking the telephone pole.

Mrs. Schneider testified that she first saw the Wilcoxson car when it was about seventy-five feet from Buchanan Street and gave as her opinion that it was not traveling more than twenty miles an hour. She did not see the Wilcoxson car come into the intersection and did not see the collision. When she saw the Wilcoxson car about seventy-five feet east of Buchanan Street, the Dupree car was one hundred and fifty to two hundred feet away.

Two other parties who testified for appellant were walking on the south side of Hillsboro Avenue, east of Buchanan Street. Their attention had not been attracted to either of the cars prior to the time of the collision and did not see them collide.

The declaration consists of two counts, the first count charges both defendants with general negligence in the operation of their respective automobiles; the negligence averred in the second count is that the defendants operated their automobiles at said intersection at a speed greater than twenty miles per hour and which was greater than reasonable and proper, having due regard to traffic on said street. Each of the defendants filed a general issue plea. At the close of plaintiff's evidence and at the close of all the evidence, appellant made a motion to direct a verdict for him, which motion was overruled. The jury returned a verdict against both defendants for \$6266. Motion for new trial was overruled and judgment entered on the

verdict. Appellant perfects his separate appeal.

One of appellant's chief grounds of reversal is that appellee has not proven by a preponderance of the evidence that he was guilty of the negligence charged. Section 33, Chapter 95, 4, of Motor Vehicle Law, Cahill's Revised Statute, provides that motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left.

The evidence is that when appellant was approximately seventy-five feet from the intersection, that the Dupee car was one hundred and fifty to two hundred feet away; that appellant's automobile entered the intersection ahead of the Dupee automobile. Under these facts, the statute gave appellant a preference in passing through the intersection and while in exercising that right, he was not relieved from the duty of exercising due care, yet he had the right to assume that the car approaching the intersection from his left would observe the law and respect his right. *Patridge v. Eberstein*, 225 Ill. App. 209; *Riddle v. Mansater*, 254 App. 68. Even though appellant, before entering the intersection, had an unobstructed view down Buchanan Street for three hundred feet or more, it can not be said under the facts shown here that his failure to halt or stop and give the Dupee car the preference across the intersection amounted to negligence. Under the circumstances as shown here, there was nothing that required appellant to anticipate that Dupee would negligently drive into the intersection and not observe his rights.

Appellee invokes the principle of *res ipsa loquitur*. In *Feldman v. Chicago Railway Co.*, 289 Ill. 25, the court said, "The doctrine of *res ipsa loquitur* may be stated thus: When a

thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence in the absence of an explanation by the parties charged, that it arose from want of proper care". The application of the doctrine of *res ipsa loquitur* to the circumstances of a case does not raise a presumption of negligence. Negligence is never presumed. But when a case is within the maxim of *res ipsa loquitur* proof of the circumstances of such case of the injury constitutes a *prima facie* case of negligence and will justify a verdict unless such *prima facie* case is overcome by proof showing that the party charged is not at fault. *Feldman v. Chicago Railway Co.*, *Supra*; *Chicago Union Traction Company v. Giese*, 229 Ill. 260.

If the doctrine had any application to this case, we are of the opinion that appellant has introduced sufficient evidence of care on his part to overcome the *prima facie* case arising from the application of the doctrine. However, before the doctrine could be applied, it must appear that the instrumentality which caused the injury was under the exclusive control of the party charged with negligence. *Schaller v. Independent Brewing Association*, 225 Ill. 492. The doctrine has no application in this case.

Appellee contends that the negligence charged in the second count is established by a preponderance of the evidence. Giving to the evidence, supporting the charge of excessive speed, the most favorable construction, we do not find that such negligence is proven by that weight of the evidence as required by law.

Appellant asks that the judgment be reversed with a finding of fact. When there is evidence tending to prove plaintiff's

cause of action, even though not sufficient to prove it by a preponderance of the evidence, the case must be remanded for a new trial. *Mirich v. Forschner Contracting Co.*, 312 Ill. 343.

The judgment of the Circuit Court of Madison County is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.
MAY TERM, A. D. 1933.

FILED
SEP 18 1933
Walter M. Buellman
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 5.

AGENDA NO. 11.

271 I.A. 616²

Martin H. Bultman,
Plaintiff in Error,

vs.

Albert Miller,
Defendant in Error.

Error to

City Court of

East St. Louis.

STONE, J.

At the November Term of the City Court of the City of East St. Louis, Illinois, Albert Miller, defendant in error, recovered judgment in the sum of \$5000.00 against plaintiff in error as damages for injuries sustained as a result of being struck by an automobile driven by plaintiff in error.

The amended declaration upon which the case was tried consisted of three counts, the first of which charged a violation of the city ordinance; the second count charged general negligence on the part of plaintiff in error in the operation of his automobile and the third charged a failure on the part of plaintiff in error to look out for defendant in error and other persons rightfully upon St. Louis Avenue, a public street in the City of East St. Louis. St. Louis Avenue runs east and west through the City of East St. Louis, and is crossed by a number of streets, among them Ninth Street and Tenth Street. It was at the intersection of Tenth Street and St. Louis Avenue that defendant in error was injured. The injury occurred on October 19, 1931, in the night time. Traffic at the intersection where the injury occurred was governed by an automatic electric light

which was erected on a standard and situated near the center of the intersection. The ordinance governing traffic at this point provides that traffic shall pass over the intersection of Tenth Street and St. Louis Avenue in obedience to a green light which is displayed by means of an automatic signal and that when a red light is displayed by said signal, traffic on the street on which it is so displayed shall come to a stop and not pass across the intersection. At the sidewalk line of this intersection there are two white lines running north and south across St. Louis Avenue providing a space of approximately four feet upon which pedestrians are to walk when crossing said St. Louis Avenue. At the point aforesaid about 7:15 p. m., of said day, defendant in error and one Kross, walking together, reached the intersection of Tenth Street and St. Louis Avenue, at which time, they say, the traffic signal in the center of the intersection was displaying a red light toward traffic moving east and west on St. Louis Avenue. Defendant in error and Mr. Kross attempted to cross to the north side of St. Louis Avenue, walking between the white lines aforesaid. They both testified that they looked to the east and west before they crossed and that they saw no automobile approaching. As they started to cross Kross was to the left of defendant in error and about six inches in front of him. While they were in this position at about ten or twelve feet from the south curb of St. Louis Avenue, defendant in error was struck by plaintiff in error's automobile, which was then proceeding east on St. Louis Avenue, and thrown upon the street there. When the automobile of plaintiff in error came to a stop the front wheels were approximately on a line with the west curb line of Tenth Street and the front part of the car had passed through the white lines on St. Louis Avenue

designated for the use of pedestrians. Defendant in error was found lying near the front of the automobile in an unconscious condition. He was taken to the hospital where it was found that he had sustained serious and permanent injuries. The amount of the verdict rendered by the jury is not questioned in this court.

Plaintiff in error and a Mr. Mitchell, who was called as a witness by plaintiff in error testified that at the time defendant in error was struck, the traffic signal in the center of the intersection was showing a green light in favor of traffic on St. Louis Avenue and a red light against traffic on Tenth Street. Plaintiff in error further testified that he entered St. Louis Avenue at Ninth Street and continued east on St. Louis Avenue at a speed of about twelve miles an hour; that he was not in a hurry and that there was nothing between him and the point where Miller was struck that would obstruct his vision of the intersection; that he was watching the traffic signal and saw defendant in error for the first time when defendant in error was about ten feet out into St. Louis Avenue, at which time he, plaintiff in error, was about ten feet west of defendant in error; that immediately upon seeing defendant in error, he turned his automobile to the right, applied his brakes and stopped as quickly as possible; that when he stopped his front wheels were even with the west curb line of Tenth Street; that at the rate of speed he was travelling, his car could be stopped in a distance of ten or twelve feet. There is no testimony that plaintiff in error sounded a horn or gave any signal that would advise defendant in error of the approach of a car. The collision admittedly occurred between two white lines designated for the travel of pedestrians across St. Louis Avenue.

Mr. Kress, who was walking with defendant in error, testified to a conversation with plaintiff in error in which he said to plaintiff in error, "Young man, we had the right of way, you are in the wrong." And that plaintiff in error looked up at him and said, "Yes, I didn't see you in time, I couldn't stop my machine on a dime." At this time defendant in error was unconscious. Plaintiff in error, in his testimony said that he did not tell Mr. Kress that he was in a hurry that night. During his examination the following took place.

"Q. What did he say to you, if anything?

1. He said that him and Miller were walking along a street and they came to St. Louis Avenue; that they were talking and having a conversation and not paying any attention to where they were walking.

Mr. Listeman: I object to that; any statement made by Kress would not be binding on plaintiff, because the testimony is that Mr. Miller was unconscious.

The Court: Objection sustained.

Q. What did you say to Kress?
Objection sustained.

Counsel for plaintiff in error then made an offer to prove those things which plaintiff in error had already answered, and an objection was sustained to the offer.

At the close of the evidence for defendant in error and again at the close of all the evidence, motions for peremptory instructions were made and denied by the court. Plaintiff in error's motion for new trial was overruled and judgment was rendered upon the verdict. The case is here by writ of error.

Excepting the contention that the trial court erred in not giving the peremptory instructions offered, no complaint is made that the jury was not properly instructed as to the law. Neither is there complaint that the verdict is excessive. Complaint is made that defendant in error was guilty of contributory negli-

gence in not seeing the approaching automobile. This is hardly consistent with plaintiff in error's contention that the manifest preponderance of evidence shows him to be free of negligence, in view of the fact that plaintiff in error says that with his bright lights shining approaching the intersection slowly and carefully, with his view wholly unobstructed, he did not see the parties crossing the street until he was within ten feet of them. Plaintiff in error could not well be free from negligence in not seeing the pedestrians crossing the street and defendant in error be guilty of contributory negligence in not seeing the approaching automobile. The argument that if defendant in error had looked he could not have helped but see the approaching car, applies with equal force to plaintiff in error. Applying this argument, it seems to us that if plaintiff in error had been looking for pedestrians who might have been crossing the street, he would have seen them and having seen them, he, himself, must have been guilty of negligence of the character which he imputes to defendant in error. The jury might, therefore, have reasonably concluded that it was negligent for plaintiff in error not to have seen the pedestrians in time to stop his car without hitting them. Particularly is this true if the signal was against him as he approached the intersection as is testified to by defendant in error and his companion, Kress. If the signal light was against him, it was the duty, under the law, of plaintiff in error, to stop and wait for the signal to go. This was not all his duty. He must have used reasonable care to see that his car did not strike defendant in error even had there been no signal there to stop him. Under all the circumstances, as plaintiff in error details them, he would have been able to see defendant in error in time to stop his car

without striking him had he looked. The jury was warranted in finding that plaintiff in error was guilty of negligence which caused the injuries to defendant in error. The verdict, therefore, is final unless at the time and place of the injuries, defendant in error was guilty of some conduct which contributed to his injuries. The evidence here fairly tends to show that defendant in error and his companion came to the intersection, found the signal light in their favor, saw nothing, and could see nothing which might endanger them as they entered the intersection. This seems to be borne out by the fact that defendant in error and his companion had advanced some ten or twelve feet into the intersection before the car which struck defendant in error was within ten or twelve feet of them. Moreover, defendant in error and his companion, Kress, both testified positively that they looked and saw no car approaching. It is true that one cannot be heard to say that he looked and did not see, where if he had properly exercised his sight he must have seen, but in the circumstances of this case this testimony might well have raised the question in the minds of the jury whether plaintiff in error was where he said he was when defendant in error and his companion entered the intersection. As defendant in error and his companion entered the intersection, the street was clear; they had the right to go. The presumption obtains that others would be in the exercise of reasonable care not to injure them. We cannot say that defendant in error, as a matter of law, was guilty of contributory negligence. It was not error to refuse the peremptory instructions. It follows, therefore, that the question whether defendant in error was guilty of conduct which contributed to his injuries was a question of fact for the jury. The jury has

found that at the time of the injury in question defendant in error was in the exercise of reasonable care for his own safety.

Plaintiff in error insists that the trial court committed material error in rejecting the offer of plaintiff in error to prove that witness, Kress, said to him that Kress and defendant in error were not looking where they were going, on the occasion of the collision, for the reason that plaintiff in error should be permitted to deny the statement made by Kress, and should be permitted to introduce the whole of the conversation between himself and Kress.

But, it is not clear from the record that the conversation which plaintiff in error sought to prove was the same conversation to which Kress testified. Further, the abstract of record does not show that plaintiff in error was explicitly asked as a witness to deny or affirm the statement attributed to him by Kress.

Even if the offered statement of Kress were part of the same conversation about which Kress testified, the subject matter of it does not fall within the rule that a party may insist upon introducing the whole of an utterance when part of it is attributed to him, and has the right, part of a conversation being introduced against him, to offer other parts of the same conversation which explain or alter the effect of his statement as an admission, because the matter offered by plaintiff in error does not tend to deny or explain the admission by plaintiff in error to which Kress testified. (Norton v Clark, 253 Ill. on 564).

We find no error which would justify a reversal of this case and the judgment is, therefore, affirmed.

Judgment affirmed.

Not to be reported in full.

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FILED

SEP 18 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM A. D. 1933

271 I.A. 616³

Term No. 11

Agenda No. 14

Stone, J:

ELECTROLUX, INC.,)	
(Plaintiff) Appellant)	
vs)	Appeal from
)	
EDWARD J. HUGHES)	The County Court
(Defendant) Appellee)	of Madison

Appellant has in all respects complied with the rules of this Court in filing its record, abstract, brief and argument.

The Appellee has filed no brief.

The case is, therefore, reversed.

Case reversed.

not to be reported in full





